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FEB 2 3 2004

No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., *Petitioner*

v.

AVIALL SERVICES, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 12, 2003
CERTIORARI GRANTED JANUARY 9, 2004

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

U.S. District Court for the Northern District of Texas, Dallas Division

8/7/1997	Complaint filed by Aviall Services, Inc. ("Aviall") in U.S. District Court for Northern District of Texas (Dallas) (Dkt. 1)
9/23/1997	Answer to Complaint and Counterclaim filed by Cooper Industries, Inc. ("Cooper") (Dkt.)
1/26/1998	Answer by Aviall to Cooper's counterclaim (Dkt. 9)
1/12/1999	First Amended Complaint filed by Aviall (Dkt. 35)
2/1/1999	Answer to First Amended Complaint and Counterclaim by Cooper (Dkt. 37)
4/16/1999	Motion for Summary Judgment by Cooper and Memorandum in support thereof (Dkt. 51-52)
5/12/1999	Response by Aviall to Cooper's Motion for Summary Judgment (Dkt. 57)
5/28/1999	Reply by Cooper to Aviall's Response to Cooper's Motion for Summary Judgment (Dkt. 63)
11/29/1999	Second Amended Complaint by Aviall (Dkt. 78)

12/22/1999	Answer by Cooper to Second Amended Complaint and Continued Counterclaim (Dkt. 79)
1/5/2000	Oral argument on Cooper's Motion for Summary Judgment before Judge Sidney Fitzwater (Dkt. 80)
1/13/2000	Memorandum Opinion and Order granting Cooper's Motion for Summary Judgment, dismissing Aviall's Section 113(f)(1) contribution claim and remaining causes of action, and Cooper's counterclaim, without prejudice, and Judgment entered (Dkt. 82-83)
1/24/2000	Motion by Aviall for reconsideration of judgment and Memorandum in support of same (Dkt. 85-86)
1/25/2000	Order denying Aviall's motion for reconsideration (Dkt. 87)
2/16/2000	Notice of Appeal by Aviall (Dkt. 88)
12/10/2002	Opinion of Fifth Circuit reversing and remanding District Court judgment (Dkt. 90-91)
12/13/2002	Order reopening case (Dkt. 92)
1/21/2003	Joint Motion by Cooper and Aviall to stay proceedings pending resolution of Cooper's Petition for Certiorari in the U.S. Supreme Court (Dkt. 93)
1/22/2003	Agreed Order granting joint motion to stay pending resolution of Petition for

	Certiorari (Dkt. 94)
1022/2003	Order directing Administrative Closure (Dkt. 95)

U.S. Court of Appeals for the Fifth Circuit

1/24/2001	Supplemental Authorities filed by Aviall
2/5/2001	Supplemental Authorities filed by Cooper
2/24/2000	Notice of Appeal filed by Aviall and case docketed
5/22/2000	Appellant's Brief filed by Aviall
5/22/2000	Record Excerpts filed by Aviall
7/25/2000	Appellee's Brief filed by Cooper
8/21/2000	Reply Brief filed by Aviall
2/7/2001	Oral Argument to Panel of Judges Wiener, Barksdale, and Garza
8/14/2001	Opinion filed and Judgment entered Affirming District Court Judgment (Judge Wiener, dissenting)
9/4/2001	Petition for Rehearing *En Banc* by Aviall
12/10/2001	Response/ Opposition filed by Cooper to Aviall's Petition for Rehearing *En Banc*
12/19/2001	Order granting Petition for Rehearing *En Banc* and case reopened
2/18/2002	Supplemental Brief filed by Aviall
2/28/2002	Amicus Curiae Brief filed by by Amicus Curiae American Petroleum Institute, Amicus Curiae American Chemistry Counsel, and Amicus Curiae Texas Oil and Gas Association

3/28/2002	Supplemental Brief filed by Cooper
5/20/2002	Oral Argument heard *en banc*
6/19/2002	Amicus Curiae brief filed by Amicus Curiae United States
7/3/2002	Second Supplemental Brief filed by Cooper in response to brief by Amicus Curiae United States
7/3/2002	Second Supplemental Brief filed by Aviall in response to brief by Amicus Curiae United States
11/14/2002	*En Banc* Opinion filed and Judgment entered, reversing panel decision, reversing District Court judgment, remanding case to District Court (Judges Garza, Smith, and Barksdale, dissenting)
2/24/2003	Notice from U.S. Supreme Court of filing of Petition for Certiorari by Cooper

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AVIALL SERVICES INCORPORATED	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. ___
COOPER INDUSTRIES. INC.	§	COMPLAINT
Defendant	§	

COMPLAINT

Aviall Services, Incorporated ("Aviall"), for its Complaint against Defendant Cooper Industries, Inc. ("Cooper"), alleges as follows:

STATEMENT OF THE CASE

1. This is a civil action, under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, et seq., as amended (hereafter "CERCLA") and under the Texas Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE ANN. Chapter 361 ("SWDA") seeking (1) reimbursement of certain investigation and remediation costs incurred by Aviall in response to the release or threat of release of hazardous substances and petroleum hydrocarbons on, under and about the properties known as the Forest Park Facility, Love Field Facility, Lemmon Terminal Facility and Carter Field Facility (collectively identified herein as the "Facilities"); and (2) declaratory judgment under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2) and 28 U.S.C. § 2201, as to

Defendant's liability for further response costs incurred and to be incurred by Aviall at the Facilities.

2. This action is also instituted under the statutory and common laws of the State of Texas seeking abatement, damages to property value, cost of repair and such other relief as just and proper.

JURISDICTION AND VENUE

3. This Court has exclusive jurisdiction over the subject matter of this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). This Court has federal question jurisdiction under 28 U.S.C. § 1331 for this civil action arising under the laws of the United States. Venue is proper in this District pursuant to Section 113(b), 42 U.S.C. § 9613(b) because the Facilities are located within this District and the release of hazardous substances and petroleum hydrocarbons occurred within this District.

4. The SWDA, negligence, negligence per se, gross negligence, trespass, nuisance, public nuisance and breach of contract claims are so related to the claims within the original jurisdiction of this Court that they form part of the same case or controversy under Article III of the United States Constitution. This Court has supplemental jurisdiction over the SWDA, negligence, negligence per se, gross negligence, trespass, nuisance, public nuisance and breach of contract claims pursuant to 28 U.S.C. § 1367 and the doctrine of pendant jurisdiction.

PARTIES

5. Plaintiff Aviall is a Delaware corporation and has its principal place of business in the State of Texas.

6. Defendant Cooper Industries, Inc., is a [sic] Ohio corporation doing business in the State of Texas. Defendant may be served with citation by delivering a copy of the

citation and this Complaint to its registered agent, CT Corporation System, 801 Dallas Avenue, Houston, Texas 77002.

BACKGROUND

7. The subject of this action concerns costs, fees and damages arising out of releases and threatened releases of hazardous materials and petroleum hydrocarbons at four facilities known individually as the Forest Park Facility, Love Field Facility, Lemmon Terminal Facility and Carter Field Facility at which Cooper and its predecessors conducted aircraft engine overhaul and maintenance operations. All four facilities are located either in Dallas, Texas near Love Field or in Fort Worth in the vicinity of the Dallas/Fort Worth International Airport.

Forest Park Facility

8. The Forest Park Facility is located at 6114 Forest Park Road, Dallas, Texas. Beginning in the late 1940's, Texas Aircraft & Engine Company ("TA&EC") and Texas Metal & Manufacturing Company ("TM&MC") conducted engine rebuilding and metal fabricating operations at that location.

9. In 1949, Cooper's predecessor, Aviation Activities Company ("AAC"), acquired TA&EC and TM&MC. On information and belief, AAC merged AAC, TA&EC and TM&MC and formed a new company known as Dallas Airmotive.

10. Dallas Airmotive, also Cooper's predecessor, continued the engine rebuilding and metal fabricating operations at the Forest Park Facility. These operations consisted, in part, of cleaning engines; painting, stripping and plating engine parts; assembling engines; testing engines; maintaining and operating underground storage

tanks and tank farms; and using, receiving and storing hazardous materials and petroleum hydrocarbons.

11. During the course of their operations, Cooper's predecessors disposed of and released hazardous materials and petroleum hydrocarbons at the Forest Park Facility. Without limitation, Cooper's predecessors buried drums of waste containing hydrochloric acid; dumped spent trichloroethylene ("TCE") used in their plating operations onto the bare ground; released into the environment TCE used to wash engines located in test cells; allowed petroleum storage tanks to overflow their contents onto the ground; buried silver plating sludges in soils; and corroded drains with acids while releasing into the drains metals, plating solutions and solvents.

Carter Field Facility

12. In 1955, Cooper's predecessor, Southwest Airmotive Company ("Southwest Airmotive"), began aircraft engine maintenance operations at Carter Field located at 15225 F.A.A. Boulevard, Forth Worth, Texas.

13. At the Carter Field Facility, Cooper's predecessor assembled, disassembled and tested aircraft engines and used, received and stored hazardous materials and petroleum hydrocarbons.

14. During the course of such operations, Cooper's predecessor released and disposed of hazardous substances and petroleum hydrocarbons into the environment. Such releases and disposals include, but are not limited to, overfilling of storage tanks with jet fuel, releasing of hazardous substances into drains, and periodic overflowing an oil/water separator with hazardous materials and petroleum hydrocarbons.

Love Field Facility

15. Beginning in 1931, Cooper's predecessor, Edwin F. Booth, Inc. began piston engine maintenance operations at the Love Field Facility located at 9311 Reeves Street, Dallas, Texas.

16. Southwest Airmotive was subsequently formed from the successor corporation to Edwin F. Booth, Inc., Booth-Herring, Inc. Southwest Airmotive continued aircraft engine overhaul operations at the Love Field Facility and eventually added 3300 Lemmon Avenue, Dallas, Texas to the Love Field Facility.

17. The aircraft engine operations conducted by Cooper's predecessors at Love Field include, but are not limited to, overhauling aircraft engines, which involved cleaning aircraft engines; painting, stripping and plating engine parts; assembling engines; testing engines; refueling of aircraft; maintaining and operating underground storage tanks and tank farms; and using, receiving, and storing hazardous materials and petroleum hydrocarbons.

18. During the course of such operations, Cooper's predecessors overfilled jet fuel storage tanks and disposed of jet fuel onto bare ground, allowed tanks and related piping to leak petroleum hydrocarbons into the surrounding environment, and caused barrels containing chemicals to accumulate and deteriorate on bare ground, leaking their contents into soils and groundwater. Further, Cooper's predecessors overfilled sumps in the plating shop with solvents and plating waste, draining such chemicals into the ground.

Lemmon Terminal Facility

19. The Lemmon Terminal Facility is located at 7511 and 7515 Lemmon Avenue, Dallas, Texas. Beginning in the

1950's, Cooper's predecessor, Southwest Airmotive, conducted engine maintenance fueling and storage at that location.

20. In connection with such operations, Cooper's predecessor overfilled fuel tanks, allowed dripping and spilling of petroleum hydrocarbons onto soils, spilled petroleum hydrocarbons onto the ground in its weed control activities, and allowed tanks and piping to deteriorate, thereby releasing petroleum hydrocarbons into soils and potentially groundwater. In addition, Cooper's predecessors released non-halogenated solvents into soils.

Cooper's Acquisition of the Facilities

21. In 1970, Dallas Airmotive merged with Cooper, and Cooper assumed all liabilities of Dallas Airmotive in the merger, including the liabilities related to the Forest Park Facility.

22. After the merger, Cooper continued the operations of Dallas Airmotive at the Forest Park Facility and continued to release and dispose of hazardous materials and petroleum hydrocarbons into the environment.

23. As a result of the acts and omissions of Cooper and its predecessors, hazardous materials and petroleum hydrocarbons released by Cooper and its predecessors at the Forest Park Facility have been detected in groundwater and soil at the facility including, but not limited to, phase separated hydrocarbons, chlorobenzenes, cis-1,2-dichloroethene (cis-1,2-DCE), perchloroethene, TCE, 1,1-dichloroethene (1,1-DCE), vinyl chloride, and hexavalent chromium. Certain hazardous materials released at the Forest Park Facility by Cooper and its predecessors have migrated through groundwater off of the Forest Park Facility property.

24. In 1973, Cooper acquired Southwest Airmotive pursuant to a merger in which Cooper assumed the obligations and liabilities of Southwest Airmotive at the Carter Field, Love Field and Lemmon Terminal Facilities.

25. Further, Cooper continued the operations of its predecessor, Southwest Airmotive, at the Carter Field, Love Field and Lemmon Terminal Facilities and continued to dispose of and release hazardous materials and petroleum hydrocarbons into the soils and groundwater at the Facilities.

26. As a result of the operations of Cooper and its predecessors at the Carter Field Facility, elevated concentrations of total petroleum hydrocarbons, benzene, toluene, ethylbenzene, and xylenes were identified in soils at the Carter Field Facility. Further, groundwater monitoring wells have identified the on-site presence of 1,l,DCE, vinyl chloride, phase-separated hydrocarbons and halogenated solvents at the Carter Field Facility.

27. As a result of the operations of Cooper and its predecessors at the Love Field Facility, unsaturated halocarbons including 1,1-DCE, cis-1,2-DCE, perchloroethene, TCE, petroleum hydrocarbons and vinyl chloride have been detected in soils. Certain unsaturated halocarbons have also been detected in groundwater at the Love Field Facility. Further, four hydrocarbon plumes exist in the groundwater at the Love Field Facility.

28. As a result of the acts and omissions of Cooper and its predecessor at the Lemmon Terminal Facility, gasoline, jet fuel, acetone, and non-halogenated solvent methylethylketone have been detected in soils in and around the on-site sewer catch basins and/or tank farm, among other areas.

29. The contamination caused by Cooper and its predecessors at the Facilities constituted unauthorized discharges prohibited by Texas Water Code Section 26.121 and Fort Worth City Code, Chapter 49 and/or Dallas City Codes, Chapter 7A.

Aviall's Acquisition of the Facilities

30. In 1981, Aviall purchased the assets of Cooper, including the Forest Park, Love Field, Lemmon Terminal and Carter Field Facilities.

31. Aviall and Cooper entered a written Asset Purchase Agreement, dated December 10, 1981 ("Agreement") which set forth the terms and conditions of the sale. Pursuant to the Agreement, Cooper assumed all liabilities arising out of pre-closing environmental contamination.

32. Cooper has refused to honor and follow the Agreement and its obligations under Texas and federal laws by failing to undertake any environmental responsibilities associated with pre-closing disposals and releases of hazardous materials and petroleum hydrocarbons.

33 In 1995 and 1996, Aviall entered two separate sales through which it sold all of its interests in the Facilities. Under the terms and conditions of such sales, Aviall has retained environmental obligations with respect to the Facilities.

34. Aviall has cooperated with the State of Texas to investigate and clean up the aforementioned contamination. Thus far, Aviall has incurred over $5,000,000 in costs to respond to, investigate, and remediate contamination at the Facilities. Aviall anticipates that such costs will eventually total approximately $21,000,000. Further, Aviall has suffered diminution in value of the Facilities and the risk of liability to off-site landowners.

35. Aviall has incurred response costs consistent with the National Contingency Plan ("NCP") pursuant to CERCLA and will incur further response costs consistent with the NCP pursuant to CERCLA in the future.

36. The response, investigation and remediation costs incurred by Aviall were also reasonable, necessary and required by the Texas Natural Resource Conservation Commission ("TNRCC"), or its predecessors.

FIRST CLAIM FOR RELIEF AGAINST COOPER
(CERCLA Cost Recovery)

37. Aviall incorporates the averments of Paragraphs 1-36 as if set out verbatim.

38. Aviall is entitled to recover from Cooper, pursuant to 42 U.S.C. § 9607, response costs incurred or to be incurred by Aviall under CERCLA in connection with the Facilities.

39. A "disposal" and "release" and/or threatened release of "hazardous substances" has occurred at the Facilities as defined by Sections 101(14), (22), and (29) of CERCLA, 42 U.S.C. §§ 9601(14), (22), and (29) of CERCLA.

40. Cooper is a responsible party under Section 107(a), 42 U.S.C. § 9607(a), of CERCLA as a past owner and operator of the Facilities at the time of disposal of hazardous substances and as an arranger for disposal of hazardous substances at the Facilities.

41. Each of the Facilities constitutes a "facility" as required by Section 107(a), 42 U.S.C. § 9607(a), of CERCLA because hazardous substances have come to be located at the Facilities.

42. Aviall has incurred recoverable response costs in responding to the contamination at the Facilities that are consistent with the NCP, 40 C.F.R. Part 300.

43. Aviall is entitled, pursuant to CERCLA, 42 U.S.C. § 9613(g)(2), 28 U.S.C. §§ 2201-2202, and TEX. CIV. PRAC. & REM. CODE ANN. Section 37.004, to a declaratory judgment as to Cooper's liability for response and remedial action costs and other liabilities in connection with the Facilities, along with related relief as is requested herein. Also, Aviall seeks recovery of costs and reasonable and necessary attorney's fees pursuant to TEX. CIV. PRAC. & REM. CODE ANN. Section 37.009.

SECOND CLAIM FOR RELIEF AGAINST COOPER
(CERCLA Contribution)

44. Aviall incorporates the averments of Paragraphs 1-43 as if set out verbatim.

45. Pursuant to CERCLA, 42 U.S.C. § 9613(f)(1), Aviall is entitled to seek contribution from Cooper, as a person liable or potentially liable under CERCLA, 42 U.S.C. § 9607(a), for any response costs and other liability Aviall has incurred or may incur under CERCLA in connection with the Facilities.

46. Aviall is entitled to contribution for all such response costs and other liability on the basis of equitable factors, including, but not limited to:

A. For over thirty years, Cooper and its predecessors owned and operated the Facilities during which time they managed and controlled waste handling and disposal practices at the Facilities and generated contamination at and from the Facilities.

B. In contrast to Cooper, Aviall has cooperated with government efforts regarding investigation and cleanup of the Facilities.

C. If Aviall bore the response costs for which Cooper is directly responsible, Cooper would obtain a windfall at Aviall's expense.

D. Cooper and Aviall agreed pursuant to the Agreement that Cooper would bear all liabilities as between them for response and remedial action costs arising out of Cooper's pre-closing operation and ownership of the Facilities.

47. Aviall is entitled, pursuant to CERCLA, 42 U.S.C. § 9613(g)(2), 28 U.S.C. §§ 2201-2202, and TEX. CIV. PRAC. & REM. CODE ANN. Section 37.004, to a declaratory judgment as to Cooper's liability for response and remedial action costs and other liabilities in connection with the Facilities, along with related relief as is requested herein. Also, Aviall seeks recovery of costs and reasonable and necessary attorney's fees pursuant to TEX. CIV. PRAC. & REM. CODE ANN. Section 37.009.

THIRD CLAIM FOR RELIEF AGAINST COOPER
(SWDA Contribution)

48. Aviall incorporates the averments of Paragraphs 1-47 as if set out verbatim.

49. Pursuant to TEX. HEALTH & SAFETY CODE ANN. Section 361.344(a), as amended, Aviall is entitled to recover from Cooper the costs of the removal or remedial actions conducted by Aviall in connection with its former Facilities.

50. Such removal and remedial actions were approved by the TNRCC and were reasonable and necessary to address a release or threatened release of a solid waste as defined by the SWDA.

51. Aviall is entitled, pursuant to 28 U.S.C. §§ 2201-2202 and TEX. CIV. PRAC. & REM. CODE ANN. Section

37.004, to a declaratory judgment as to Cooper's liability for response and remedial action costs and other liabilities in connection with the Facilities, along with related relief as is requested herein. Also, Aviall seeks recovery of costs and reasonable and necessary attorney's fees pursuant to TEX. HEALTH & SAFETY CODE ANN. Section 361.344(a) and TEX. CIV. PRAC. & REM. CODE ANN. Section 37.009.

FOURTH CLAIM FOR RELIEF AGAINST COOPER
(Negligence and Negligence Per Se)

52. Aviall incorporates the averments of Paragraphs 1-51 as if set out verbatim.

53. The actions and omissions of Cooper and its predecessors in connection with their operations at the former Aviall Facilities were negligent.

54. Cooper owes Aviall a duty to exercise ordinary care in the conduct of its and its predecessors' operations at the Facilities and has a duty to conduct such operations in a reasonable and prudent manner so that soils and groundwater are not polluted by petroleum hydrocarbons, solvents and other substances.

55. Cooper's conduct and that of its predecessors' constitutes a breach and continuing breach of these duties, giving rise to negligence and negligence per se.

56. Such negligence is a proximate cause of Aviall's injuries. Cooper's wrongful acts include, without limitation, the following:

A. Failure to properly dispose of hazardous materials and drums containing hazardous materials;

B. Failure to adequately inspect underground storage tank systems, waste lines, and storage facilities;

C. Failure to timely repair leaks and other equipment failures;

D. Failure to timely report and/or notify the TNRCC or its predecessors of known and suspected leaks; disposals or spills;

E. Failure to comply with applicable environmental laws including, but not limited to, TEXAS WATER CODE Section 26.121, which prohibits pollution of the waters of Texas except as authorized by the TNRCC;

F. Failure to notify and/or warn Aviall of conditions causing and potentially causing contamination;

G. Failure to operate in accordance with prudent operating standards in the industry;

H. Failure to adequately protect the natural resources of the State of Texas, including its groundwater;

I. Failure to adequately train and supervise personnel with respect to proper waste disposal practices;

J. Failure to adequately train and supervise personnel to conduct operations in accordance with the laws, orders and rules of the State of Texas and the codes of the Cities of Dallas and Fort Worth; and

K. Failure to investigate, remediate, and take affirmative actions to investigate, respond to, abate and eliminate the contamination and hazardous conditions existing at the Facilities.

57. Cooper knew or should have known that such failures as described in Paragraph 56 above would cause pollution of the soil and groundwater at the Facilities.

58. The negligent or grossly negligent actions and omissions of Cooper have caused damage to Aviall. As a proximate result of Cooper's negligent acts and omissions, as set forth herein, Aviall has suffered and in the future will suffer injuries related to the contamination.

59. Cooper's actions and inactions allowing pollutants and hazardous materials to enter surface and subsurface soils and groundwater are direct violations of Texas rules and regulations and Dallas and Fort Worth codes designed to prevent pollution and injury to entities like Aviall, amounting to negligence per se.

FIFTH CLAIM FOR RELIEF AGAINST COOPER
(Gross Negligence)

60. Aviall incorporates the averments of Paragraphs 1-59 as if set out verbatim.

61. Cooper's operations at the Facilities have been managed and performed with such lack of care and such reckless disregard for the protection of the surface and subsurface of the Facilities that such conduct amounts to gross negligence or willful misconduct as a matter of law. Coopers' wrongful conduct, acts and omissions constituting gross negligence consist of, but are not limited to, the following:

a. Cooper's conscious business decision to engage in illegal waste disposal methods and the resulting contamination problems caused thereby; and

b. The knowledge of and conscious indifference to the risks involved and consequences of ignoring the threat to groundwater, the environment and public health and safety posed by Cooper's failure to comply with Dallas and Fort Worth codes and Texas laws, rules, orders and regulations and failure to take

any steps to prevent injury to Aviall and the public as a result of Cooper's acts and omissions.

62. Cooper's conduct constitutes a breach and continuing breach of the duties giving rise to this gross negligence count.

SIXTH CLAIM FOR RELIEF AGAINST COOPER
(Trespass)

63. Aviall incorporates the averments of Paragraphs 1-62 as if set out verbatim.

64. In the course of engaging in the acts and omissions described herein, Cooper has caused and allowed the release, escape and migration of hazardous materials and petroleum products into the soils and groundwater underlying Aviall's former property.

65. Cooper caused or allowed the entry of petroleum hydrocarbons, solvents and other substances upon and under Aviall's former property without Aviall's permission or invitation. Aviall was, at the time of its previous occupation of the Facilities, lawfully entitled to possession of the real estate at issue.

66. Cooper intentionally conducted operations in such a manner as to either not guard against, or to purposefully allow or cause, pollutants and other hazardous materials to migrate into and contaminate the surface and subsurface soil and groundwater in violation of Aviall's former vested property rights. This constituted an intentional invasion of Aviall's former property, thus constituting an intentional trespass and continuing trespass as those terms are defined and understood under the laws and statutes of the State of Texas. Such intentional trespass was also a legal or contributing cause to Aviall's damages as herein alleged.

67. Cooper's intentional trespass constitutes the proximate cause of injury, damage and loss to Aviall.

SEVENTH CLAIM FOR RELIEF AGAINST COOPER
(Private Nuisance)

68. Aviall incorporates the averments of Paragraphs 1-67 as if set out verbatim.

69. Cooper knew to a reasonable certainty, or in the exercise of ordinary care should have known, that its acts and omissions would cause material harm to Aviall as well as substantial costs to clean up contamination. Cooper has voluntarily, intentionally, or negligently interfered with the use and enjoyment of Aviall's former property. Cooper's acts and omissions have caused and continue to cause pollutants and other hazardous substances to enter the Facilities amounting to a present and continuing nuisance.

70. Further, the acts and omissions of Cooper were an intentional invasion of Aviall's former interest in the Facilities, including the surface, subsurface and groundwater beneath the land, or in the alternative, a negligent invasion of Aviall's former property interests in the surface, subsurface and groundwater beneath the Facilities. This invasion of Aviall's former property interests has interfered and is continuing to interfere with the use and enjoyment of the Facilities and the normal and expected use and enjoyment of the Facilities and groundwater. These acts committed by Cooper constitute a nuisance. Such nuisance is also a legal and contributing cause of injury to the Facilities.

71. The pollution caused by Cooper is continuing, exists today and will, in all likelihood, continue into the future, thus constituting a continuing tort. Cooper has violated its common-law obligations to abate and correct the continuing nuisance it created. As alleged above, Cooper's actions are

and were intentional or reckless, such that the harm to Aviall's interests were substantially certain to follow.

72. The presence of petroleum hydrocarbons, solvents and other hazardous materials in groundwater and soil is offensive, inconvenient and annoying to persons with normal sensibilities in the surrounding community.

73. The nuisances created by Cooper subvert the welfare of the environment and public and constitute an obstruction of public rights with respect to Aviall and landowners surrounding the Facilities.

74. As a result of the nuisance created by Cooper and its offensive and injurious effects, Aviall has been forced to incur response and remediation costs and other costs associated with damage to the Facilities.

EIGHTH CLAIM FOR RELIEF AGAINST COOPER
(Public Nuisance)

75. Aviall incorporates the averments of Paragraphs 1-74 as if set out verbatim.

76. Cooper's acts and omissions remain a source of continuing pollution for which Cooper has refused to accept responsibility. Cooper's acts and omissions have caused and continue to cause pollutants and other hazardous materials to emanate from certain Facilities amounting to a present and continuing public nuisance.

77. In committing these acts and omissions, Cooper has created, maintained and refused to abate a public nuisance, contrary to the laws of the State of Texas. Further, Cooper willfully and intentionally, and in utter disregard of these laws, damaged and continues to damage the Facilities. Cooper's actions resulting in the contamination of soils and groundwater have subverted and are subverting the public order and have constituted and are constituting an

obstruction of the public's rights. Aviall has suffered damages in the form of response costs, remediation costs, diminution to real property value and repair costs.

NINTH CLAIM FOR RELIEF AGAINST COOPER
(Breach of Contract by Cooper)

78. Aviall incorporates the averments of Paragraphs 1-77 as if set out verbatim.

79. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper retained all risk of costs, damages and liabilities arising out of pre-closing disposals of hazardous materials and contamination.

80. Cooper agreed to retain all liabilities or obligations not expressly assumed by Aviall under the Agreement, those liabilities and obligations covered by Cooper's insurance, and/or all liabilities or obligations constituting a violation of federal, state or local law or requirement of any governmental authority.

81. Aviall has incurred costs and liabilities related to Cooper's violation of applicable law and governmental authority governing Cooper's acts at the Facilities. Such costs and liabilities arise out of Cooper's acts and omissions resulting in the contamination of soils and groundwater at the Facilities. Moreover, Aviall itself never agreed to assume such costs and liabilities under the Agreement.

82. Aviall has requested that Cooper undertake its obligations and liabilities under the Agreement, and Cooper breached its duties under the Agreement by refusing to assume and satisfy such obligations and liabilities.

83. Aviall has incurred and continues to incur substantial damages as a result of Cooper's breaches of the Agreement.

WHEREFORE, Aviall prays for the relief requested above, for costs, attorneys fees, interest as allowed by law and for general relief.

DATED: August 7, 1997

Respectfully submitted,

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By permission
/s/ Joan Krajewski

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AVIALL SERVICES INCORPORATED	§	
PLAINTIFF,	§	
VS.	§	CIVIL ACTION NO. 3-97CV1926-D
COOPER INDUSTRIES. INC.	§	FIRST AMENDED COMPLAINT
DEFENDANT.	§	

§

FIRST AMENDED COMPLAINT

Aviall Services, Incorporated ("Aviall"), for its First Amended Complaint against Defendant Cooper Industries, Inc. ("Cooper"), alleges as follows:

STATEMENT OF THE CASE

1. This is a civil action, under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, et seq., as amended (hereafter "CERCLA"), under the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. Chapter 361 ("SWDA"), and the Texas Water Code § 26.3513 seeking (1) reimbursement of certain investigation and remediation costs incurred by Aviall in response to the release or threat of release of hazardous substances and petroleum hydrocarbons on, under and about the properties known as the Forest Park Facility, Love Field Facility, Lemmon Terminal Facility and Carter Field Facility (collectively identified herein as the "Facilities"); and (2)

declaratory judgment under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2) and 28 U.S.C. § 2201, as to Defendant's liability for further response costs incurred and to be incurred by Aviall at the Facilities.

2. This action is also instituted under the common laws of the State of Texas for breach of contract, breach of warranty and contractual indemnity arising from a written Asset Purchase Agreement, dated December 10, 1981 ("Agreement"), seeking abatement, damages to property value, cost of repair and such other relief as just and proper. An alternative claim in quantum meruit to preclude Cooper from being unjustly enriched by Aviall's remediation activities is also asserted herein.

JURISDICTION AND VENUE

3. This Court has exclusive jurisdiction over the subject matter of this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). This Court has federal question jurisdiction under 28 U.S.C. § 1331 for this civil action arising under the laws of the United States. Venue is proper in this District pursuant to Section 113(b), 42 U.S.C. § 9613(b) because the Facilities are located within this District and the release of hazardous substances and petroleum hydrocarbons occurred within this District. The amount in controversy exceeds the amount required for adjudication by this Court.

4. The SWDA, Texas Water Code, breach of contract, breach of warranty, and contractual indemnity and quantum meruit claims are so related to the claims within the original jurisdiction of this Court that they form part of the same case or controversy under Article III of the United States Constitution. This Court has supplemental jurisdiction over the SWDA, negligence, negligence per se, gross negligence, trespass, nuisance, public nuisance and breach of

contract claims pursuant to 28 U.S.C. § 1367 and the doctrine of pendent jurisdiction.

PARTIES

5. Plaintiff Aviall is a Delaware corporation and has its principal place of business in the State of Texas.

6. Defendant Cooper Industries, Inc., is a [sic] Ohio corporation doing business in the State of Texas. Defendant may be served with citation by delivering a copy of the citation and this Complaint to its registered agent, CT Corporation System, 801 Dallas Avenue, Houston, Texas 77002.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

7. The subject of this action concerns costs, fees and damages arising out of releases and threatened releases of hazardous materials and petroleum hydrocarbons at four facilities known individually as the Forest Park Facility, Love Field Facility, Lemmon Terminal Facility and Carter Field Facility. At those facilities, Cooper and its predecessors conducted aircraft engine overhaul and/or maintenance operations. All four facilities are located either in Dallas, Texas near Love Field Airport or in Fort Worth in the vicinity of the Dallas/Fort Worth International Airport. The factual background for each facility and the conduct of the parties is alleged below.

Forest Park Facility

8. The Forest Park Facility is located at 6114 Forest Park Road, Dallas, Texas. Beginning in the late 1940's, Texas Aircraft & Engine Company ("TA&EC") and Texas Metal & Manufacturing Company ("TM&MC") conducted engine rebuilding and metal fabricating operations at that location.

9. In 1949, Cooper's predecessor, Aviation Activities Company ("AAC"), acquired TA&EC and TM&MC. On information and belief, AAC merged AAC, TA&EC and TM&MC and formed a new company known as Dallas Airmotive.

10. Dallas Airmotive, also Cooper's predecessor, continued the engine rebuilding and metal fabricating operations at the Forest Park Facility. These operations consisted, in part, of cleaning engines; painting, stripping and plating engine parts; assembling engines; testing engines; maintaining and operating underground storage tanks and tank farms; and using, receiving and storing hazardous materials and petroleum hydrocarbons.

11. During the course of their operations, Cooper's predecessors disposed of and released hazardous materials and petroleum hydrocarbons at the Forest Park Facility. Without limitation, Cooper's predecessors buried drums of waste containing hydrochloric acid; dumped spent trichloroethylene ("TCE") used in their plating operations onto the bare ground; released into the environment TCE used to wash engines located in test cells; allowed petroleum storage tanks to overflow their contents onto the ground; buried silver plating sludges in soils; and corroded drains with acids while releasing into the drains metals, plating solutions and solvents.

Carter Field Facility

12. In 1955, Cooper's predecessor, Southwest Airmotive Company ("Southwest Airmotive"), began aircraft engine maintenance operations at Carter Field located at 15225 F.A.A. Boulevard, Forth Worth, Texas.

13. At the Carter Field Facility, Cooper's predecessor assembled, disassembled and tested aircraft

engines and used, received and stored hazardous materials and petroleum hydrocarbons.

14. During the course of such operations, Cooper's predecessor released and disposed of hazardous substances and petroleum hydrocarbons into the environment. Such releases and disposals include, but are not limited to, overfilling of storage tanks with jet fuel, releasing of hazardous substances into drains, and periodic overflowing of an oil/water separator with hazardous materials and petroleum hydrocarbons.

Love Field Facility

15. Beginning in 1931, Cooper's predecessor, Edwin F. Booth, Inc. began piston engine maintenance operations at the Love Field Facility located at 9311 Reeves Street, Dallas, Texas.

16. Southwest Airmotive was subsequently formed from the successor corporation to Edwin F. Booth, Inc., Booth-Herring, Inc. Southwest Airmotive continued aircraft engine overhaul operations at the Love Field Facility and eventually added 3300 Lemmon Avenue, Dallas, Texas to the Love Field Facility.

17. The aircraft engine operations conducted by Cooper's predecessors at Love Field include, but are not limited to, overhauling aircraft engines, which involved cleaning aircraft engines; painting, stripping and plating engine parts; assembling engines; testing engines; refueling of aircraft; maintaining and operating underground storage tanks and tank farms; and using, receiving, and storing hazardous materials and petroleum hydrocarbons.

18. During the course of such operations, Cooper's predecessors overfilled jet fuel storage tanks and disposed of jet fuel onto bare ground, allowed tanks and related piping to leak petroleum hydrocarbons into the

surrounding environment, and caused barrels containing chemicals to accumulate and deteriorate on bare ground, leaking their contents into soils and groundwater. Further, Cooper's predecessors overfilled sumps in the plating shop with solvents and plating waste, draining such chemicals into the ground.

Lemmon Terminal Facility

19. The Lemmon Terminal Facility is located at 7511 and 7515 Lemmon Avenue, Dallas, Texas. Beginning in the 1950's, Cooper's predecessor, Southwest Airmotive, conducted aircraft maintenance, fueling and storage at that location.

20. In connection with such operations, Cooper's predecessor overfilled fuel tanks, allowed dripping and spilling of petroleum hydrocarbons onto soils, spilled petroleum hydrocarbons onto the ground in its fueling and weed control activities, and allowed tanks and piping to deteriorate, thereby releasing petroleum hydrocarbons into soils and potentially groundwater. In addition, Cooper's predecessors released non-halogenated solvents into soils.

Cooper's Acquisition of the Forest Park Facility

21. In 1970, Cooper purchased Dallas Airmotive and merged Dallas Airmotive into Cooper. As a result of this merger, Cooper assumed all obligations of and belongings to Dallas Airmotive, including the environmental liabilities relating to the Forest Park Facility.

22. After the merger, Cooper continued operations and purchased additional, adjacent property at the Forest Park Facility and continued to release and dispose of hazardous materials and petroleum hydrocarbons into the environment.

Pollution at the Forest Park Facility by Cooper and its [sic] Predecessors

23. As a result of the acts and omissions of Cooper and its predecessors, hazardous materials and petroleum hydrocarbons released by Cooper and its predecessors at the Forest Park Facility have been detected in groundwater and soil at the facility including, but not limited to, phase separated hydrocarbons, chlorobenzenes, cis-1,2-dichloroethene (cis-1,2-DCE), perchloroethene, TCE, 1,1-dichloroethene (1,1-DCE), vinyl chloride, and hexavalent chromium. Certain hazardous materials released at the Forest Park Facility by Cooper and its predecessors have migrated through groundwater off of the Forest Park Facility property.

Cooper's Acquisition of the Carter Field, Love Field and Lemmon Terminal Facilities

24. In 1973, Cooper purchased the stock of Southwest Airmotive, Inc. As a result of the stock purchase, Cooper assumed the obligations and liabilities of Southwest Airmotive at the Carter Field, Love Field and Lemmon Terminal Facilities.

Cooper's Pollution of the Carter Field, Love Field and Lemmon Terminal Facilities

25. Further, Cooper continued the operations at the Carter Field, Love Field and Lemmon Terminal Facilities and continued to dispose of and release hazardous materials and petroleum hydrocarbons into the soils and groundwater at the Facilities.

26. As a result of the operations of Cooper and its predecessors at the Carter Field Facility, elevated concentrations of total petroleum hydrocarbons, benzene, toluene, ethylbenzene, and xylenes were identified in soils at

the Carter Field Facility. Further, groundwater monitoring wells have identified the on-site presence of 1,1-DCE, vinyl chloride, dissolved-phase hydrocarbons and halogenated solvents at the Carter Field Facility.

27. As a result of the operations of Cooper and its predecessors at the Love Field Facility, unsaturated halocarbons including 1,1-DCE, cis-1,2-DCE, perchloroethene, TCE, petroleum hydrocarbons and vinyl chloride have been detected in soils. Certain unsaturated halocarbons and dissolved-phase hydrocarbons have also been detected in groundwater at the Love Field Facility. Further, four hydrocarbon plumes exist in the soil and groundwater at the Love Field Facility.

28 As a result of the acts and omissions of Cooper and its predecessor at the Lemmon Terminal Facility, gasoline, jet fuel, acetone, and non-halogenated solvent methylethylketone have been detected in soils in and around the on-site sewer catch basins and/or tank farm, among other areas.

29. The contamination caused by Cooper and its predecessors at the Facilities constituted unauthorized discharges prohibited by applicable law, the Texas Water Code Section 26.121 and Fort Worth City Code, Chapter 49 and/or Dallas City Codes, Chapter 7A.

Aviall's Acquisition of the Facilities from Cooper - The Asset Purchase Agreement

30. In 1981, Aviall (through Aviall's predecessor, Aviation Power Supply, Inc.) purchased certain assets of Cooper, including the operations at the Forest Park, Love Field, Lemmon Terminal and Carter Field Facilities.

31. Aviall and Cooper entered a written Asset Purchase Agreement, dated December 10, 1981

("Agreement") which set forth the terms and conditions of the sale. Pursuant to the Agreement, Cooper retained all liabilities arising out of pre-closing environmental contamination.

32. Additionally, Cooper represented, in consideration for the Agreement, that Cooper was not in violation of any law, regulation or requirement relating to the Facilities, including without limitation applicable environmental protection laws and regulations. This representation was false. In fact, at the time of closing the Agreement, Cooper was in violation of environmental protection laws and regulations.

33. In consideration for the Agreement, Cooper entered into an "affirmative covenant" that, prior to closing, Cooper would comply with all legal requirements and contractual obligations applicable to the purchased assets. In fact, Cooper did not comply with all legal requirements and contractual obligations prior to the closing date.

34. In the Agreement, Cooper agreed to promptly inform Aviall in writing of all material variances from the representations and warranties contained in Article 4 of the Agreement. In fact, Cooper failed to inform Aviall of material variances in environmental compliance from the representations made in Section 4.09(f) of the Agreement.

35. Cooper has refused to honor and follow the Agreement and its obligations under Texas and federal laws by failing to recognize, accept and undertake any environmental responsibilities associated with pre-closing disposals and releases of hazardous materials and petroleum hydrocarbons at the Facilities.

Aviall's Sales of the Facilities and Standing to Sue

36. In 1995 and 1996, Aviall entered two separate sales through which it sold all of its interests in the Facilities.

Under the terms and conditions of such sales, Aviall has retained pre-closing environmental obligations with respect to the Facilities. Accordingly Aviall has standing to prosecute this action.

Aviall's Costs

37. Aviall has cooperated with the State of Texas to investigate and clean up the aforementioned contamination. Thus far, Aviall has incurred over $5,000,000 in costs to respond to, investigate, and remediate contamination at the Facilities. Aviall anticipates that such costs could exceed $21,000,000. Further, Aviall has suffered diminution in value of the Facilities through the 1995 and 1996 sales and the risk of liability to off-site landowners.

38. Aviall has incurred response costs consistent with the National Contingency Plan ("NCP") pursuant to CERCLA and will incur further response costs consistent with the NCP pursuant to CERCLA in the future, as well as costs reimbursable under the laws of the State of Texas.

39. The response, investigation and remediation costs incurred by Aviall were also reasonable, necessary and required by the Texas Natural Resource Conservation Commission ("TNRCC") or its predecessors.

40. A "disposal" and "release" and/or threatened release of "hazardous substances" and or "hazardous waste" has occurred at the Facilities as defined by Sections 101(14), (22), and (29) of CERCLA, 42 U.S.C. §§ 9601(14), (22), and (29) of CERCLA and by TEX. HEALTH & SAFETY CODE ANN. Sec. 361.003.

41. Cooper is a person who is a responsible party under Section 107(a), 42 U.S.C. § 9607(a), of CERCLA as a past owner and operator of the Facilities at the time of disposal of hazardous substances and as an arranger for disposal of hazardous substances at the Facilities.

42. Forest Park, Love Field and Carter Field each constitute a "facility" as required by Section 107(a), 42 U.S.C. § 9607(a), of CERCLA. Hazardous substances have come to be located at the Facilities.

43. Aviall has incurred recoverable response costs in responding to the contamination at the Facilities that are consistent with the NCP, 40 C.F.R. Part 300.

FIRST CLAIM FOR RELIEF AGAINST COOPER

(Breach of Contract by Cooper)

44. Aviall incorporates the averments of Paragraphs 1-43 as if set out verbatim.

45. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper retained all risk of costs, damages and liabilities arising out of pre-closing disposals of hazardous materials and contamination.

46. Cooper agreed to retain all liabilities or obligations (i) not expressly assumed by Aviall under the Agreement, (ii) those liabilities and obligations covered by Cooper's insurance, and/or (iii) all liabilities or obligations constituting a violation of federal, state or local law or requirement of any governmental authority. Additionally, in the Agreement, Cooper falsely represented that it was not in violation of any law, regulation or requirement relating to the Facilities, including, without limitation, applicable environmental protection laws and regulations. Moreover, Cooper agreed to promptly inform Aviall in writing of all material variances from the representations and warranties contained in Article 4 of the Agreement. Notwithstanding this Agreement, Cooper entirely failed to inform Aviall of the material variances from its representations and warranties of environmental compliance.

47. Aviall has incurred costs and liabilities related to Cooper's violation of applicable law and governmental

authorities' requirements governing Cooper's acts at the Facilities. Such costs and liabilities arise out of Cooper's acts and omissions resulting in the contamination of soils and groundwater at the Facilities. Moreover, Aviall itself never agreed to assume such costs and liabilities under the Agreement.

48. Aviall has requested that Cooper undertake its obligations and liabilities under the Agreement. Cooper has breached its duties under the Agreement by refusing to assume and satisfy such obligations and liabilities. Moreover, by refusing to honor its obligations, Cooper has engaged in an anticipatory breach of the Agreement, thereby entitling Aviall to recover damages for costs to be incurred in the future as a proximate result of Cooper's anticipatory breach.

49. Aviall has incurred and continues to incur substantial damages proximately caused as a result of Cooper's breaches of the Agreement. In reasonable probability, Aviall will incur substantial damages in the future as a result of Cooper's anticipatory breach of the Agreement.

SECOND CLAIM FOR RELIEF AGAINST COOPER
(Breach of Warranty)

50. Aviall incorporates the averments of Paragraphs 1-49 as if set out verbatim.

51. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper expressly warranted that it was not in violation of any applicable law, regulation or requirement relating to the operation of the Facilities, including applicable environmental laws and regulations.

52. By releasing petroleum and hazardous substances into the ground and groundwater at the Facilities,

Cooper violated applicable environmental laws and regulations.

53. Accordingly, Cooper breached the warranty set forth in the Agreement regarding compliance with applicable environmental laws and regulations. Moreover, although Cooper agreed to notify Aviall about any material variances from the warranties regarding environmental compliance, Cooper has never notified Aviall of regarding its non-compliance. As a result, Aviall has incurred and will continue to incur substantial damages proximately caused as a result of this breach of warranty.

THIRD CLAIM FOR RELIEF AGAINST COOPER
(Contractual Indemnification)

54. Aviall incorporates the averments of Paragraphs 1-53 as if set out verbatim.

55. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper agreed to indemnify Aviall against any loss, liability, damage or expense that Aviall may incur as a result of a breach by Cooper of any representation, warranty, covenant or agreement contained in the Agreement.

56. By refusing to honor its retained environmental liabilities resulting from Cooper's pre-closing activities, and by the other breaches, acts and omissions alleged herein, Cooper breached representations, warranties, covenants and agreements set forth in the Agreement.

57. Accordingly, Cooper is required under the Agreement to indemnify Aviall for all past and future losses, damages and expenses incurred as a proximate result of Cooper's breach of those representations, warranties, covenants and agreements.

FOURTH CLAIM FOR RELIEF AGAINST COOPER
(Declaratory Judgment)

58. Aviall incorporates the averments of Paragraphs 1-57 as if set out verbatim.

59. This claim is for declaratory judgment pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 9613 for the purpose of determining a question of actual controversy between and among the parties.

60. An actual controversy has arisen and now exists between Aviall and Cooper in that Aviall contends and Cooper will deny or will likely deny:

(A) that, as between the parties, responsibility for certain releases or threatened releases of hazardous substances at or from the Facilities has been retained by Cooper; and

(B) that as a result, Cooper is obligated to indemnify Aviall for any sums that it has paid or may be compelled to pay as a result of such release or threatened release of hazardous substances and/or hazardous and solid wastes at or from the Facilities;

(C) that Cooper is liable for certain response costs incurred by Aviall, or damages sustained by Aviall under CERCLA, SWDA and the Texas Water Code;

(D) that Cooper is liable for certain response costs incurred by Aviall, or damages sustained by Aviall in

the future under CERCLA, SWDA and the Texas Water Code;

(E) that Aviall is entitled to a declaratory judgment of future liability at the Facilities that will be binding on any subsequent actions to recover response costs incurred at the Facilities in the future.

64. Aviall therefore requests that this Court enter a declaratory judgment declaring that Cooper is liable for all or part of the costs, plus interest, of past, present and future actions taken by Aviall, or any other person or entity, to responses to releases or threatened releases of hazardous substances and solid and hazardous wastes at or proximately caused by conditions that existed before December 10, 1981 in connection with the Facilities for any past or future response costs incurred or damages sustained that arise from activities at the Facilities.

FIFTH CLAIM FOR RELIEF AGAINST COOPER
(Liability under CERCLA)

65. Aviall incorporates the averments of paragraphs 1-64 above as if set forth verbatim.

66. Pursuant to CERCLA, 42 U.S.C. § 9613(f)(1), Aviall is entitled to seek contribution from Cooper, as a person liable or potentially liable under CERCLA, 42 U.S.C. § 9607(a), for any response costs and other liability Aviall has incurred or may incur under CERCLA in connection with the Facilities.

67. Aviall is entitled to contribution for all such response costs and other liability on the basis of equitable factors, including, but not limited to:

(A) for over thirty years, Cooper and its predecessors owned and operated the Facilities during which time they managed and controlled waste handling and disposal practices at the Facilities and generated contamination at and from the Facilities;

(B) in contrast to Cooper, Aviall has cooperated with government efforts regarding investigation and cleanup of the Facilities;

(C) if Aviall bore the response costs for which Cooper is directly responsible, Cooper would be unjustly enriched and obtain a windfall at Aviall's expense;

(D) Cooper and Aviall agreed pursuant to the Agreement that Cooper would bear all liabilities as between them for response and remedial action costs arising out of Cooper's pre-closing operation and ownership of the Facilities.

SIXTH CLAIM FOR RELIEF AGAINST COOPER
(Contribution Under the Texas
Solid Waste Disposal Act)

68. Aviall incorporates the averments of Paragraphs 1-67 as if set out verbatim.

69. Pursuant to Tex. Health & Safety Code Ann. Section 361.344(a), as amended, Aviall is entitled to recover

from Cooper the costs of the removal or remedial actions conducted by Aviall in connection with its former Facilities.

70. Such removal and remedial actions were approved by the TNRCC and were reasonable and necessary to address a release or threatened release of a solid waste as defined by the SWDA. Aviall is entitled to apportionment of costs as provided b [sic] the SWDA.

71. Aviall is entitled, pursuant to 28 U.S.C. §§ 2201-2202 and Tex. Civ. Prac. & Relv1. Code Ann. Section 37.004, to a declaratory judgment as to Cooper's liability for response and remedial action costs and other liabilities in connection with the Facilities, along with related relief as is requested herein. Also, Aviall seeks recovery of costs and reasonable and necessary attorney's fees pursuant to Tex. Health & Safety Code Ann. Section 361.344(a) and Tex. Civ. Prac. & Relv1. Code Ann. Section 37.009.

SEVENTH CLAIM FOR RELIEF AGAINST COOPER
(Contribution Under the Texas Water Code)

72. Aviall incorporates the averments of Paragraphs 1-71 as if set out verbatim.

73. Cooper, while owner and operator of the Facilities, placed, used and maintained storage tanks at the Facilities. As a result of its actions, regulated hazardous, toxic or otherwise harmful substances, including without limitation, jet fuel, diesel, gasoline, solid and hazardous waste and hazardous substances, were released, causing or threatening to cause serious groundwater and other contamination. The release and threatened releases present substantial danger to the public health, welfare, or the environment.

74. Cooper failed to take corrective action at the Facilities. Aviall has incurred reasonable and necessary

response costs by taking corrective action in response to releases or threatened releases of hazardous substances and/or hazardous and solid wastes. Aviall will continue to incur such costs in eliminating releases and threatened releases.

75. An actual and judicial controversy exists between the parties concerning liability for costs incurred by Aviall, including attorneys' fees and interest, which Aviall contend are due it from Cooper pursuant to the Texas Water Code § 26.3513, and Aviall seeks contribution against Cooper, as the former owner and operator of the Facilities for the corrective action costs incurred. Pursuant to Texas law, Aviall is entitled to judgment in its favor and against Cooper for contribution, adjudging and deeming that Cooper is liable for the amounts expended by Aviall in response to the releases or threatened releases, plus attorneys' fees, court costs, and interest therein, plus any future costs incurred by Plaintiffs.

EIGHTH CLAIM FOR RELIEF AGAINST COOPER
(Quantum Meruit)

76. Aviall incorporates the averments of Paragraphs 1-75 as if set out verbatim.

77. Aviall has furnished and is furnishing valuable services and materials to Cooper by cleaning up the Facilities, an obligation for which Cooper is partially liable.

78. Theses [sic] services and materials were performed and are performed to the benefit of Cooper and enjoyed by Cooper.

79. Aviall notified Cooper of the services and materials and expected to be paid by Cooper for such services.

80. Accordingly, as an alternative to the other above-mentioned claims, Aviall is entitled to all costs and expenses it has incurred under the theory of quantum meruit.

NINTH CLAIM FOR RELIEF AGAINST COOPER
(Attorneys' Fees)

81. Aviall incorporates the averments of Paragraphs 1-80 as if set out verbatim.

82. Aviall has repeatedly demanded that Cooper comply with the Agreement and pay Aviall for Cooper's share of its response costs incurred to clean up the Facilities.

83. Because Cooper repeatedly refused to honor its commitments, Aviall retained the undersigned counsel to pursue this litigation on its behalf.

84. Aviall has paid or agreed to pay the undersigned counsel reasonable and necessary fees and expenses incurred in connection with this action.

85. Aviall is entitled, pursuant to CERCLA, 42 U.S.C. § 9613(g)(2), 28 U.S.C. §§ 2201-2202, Tex. Civ. Prac. & Rem. Code Ann. sections 37.009 and 38.002, section 7.02(a) of the Agreement, and Tex. Health & Safety Code Ann. Section 361.344, as well as under the SWDA and the Texas Water Code, to a judgment against Cooper for all attorneys' fees and costs incurred in association with these claims.

WHEREFORE, Aviall prays for the relief requested above, for costs, attorneys' fees, interest as allowed by law and for general relief.

DATED: January 12, 1999.

Respectfully submitted,

/s/ Douglas S. Lang
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(Certificate of Service
omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AVIALL SERVICES INCORPORATED	§	
	§	
PLAINTIFF,	§	
	§	
VS.	§	CIVIL ACTION NO. 3-97CV1926-D
	§	
COOPER INDUSTRIES, INC.	§	
	§	
DEFENDANT.	§	
	§	

SECOND AMENDED COMPLAINT

Aviall Services, Incorporated ("Aviall"), for its Second Amended Complaint against Defendant Cooper Industries, Inc. ("Cooper"), alleges as follows:

STATEMENT OF THE CASE

1. This is a civil action, under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, et seq., as amended (hereafter "CERCLA"), under the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. Chapter 361 ("SWDA"), and the Texas Water Code § 26.3513, seeking (1) reimbursement of certain investigation and remediation costs incurred by Aviall in response to the release or threat of release of hazardous substances and petroleum hydrocarbons on, under and about the properties known as the Forest Park Facility, Love Field Facility,

Lemmon Terminal Facility and Carter Field Facility (collectively identified herein as the "Facilities"); and (2) declaratory judgment under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2) and 28 U.S.C. § 2201, as to Defendant's liability for further response costs incurred and to be incurred by Aviall at the Facilities.

2. This action is also instituted under the common laws of the State of Texas for breach of contract, breach of warranty and contractual indemnity arising from a written Asset Purchase Agreement, dated December 10, 1981 ("Agreement"), seeking abatement, damages to property value, cost of repair and such other relief as just and proper. An alternative claim in quantum meruit to preclude Cooper from being unjustly enriched by Aviall's remediation activities is also asserted herein.

JURISDICTION AND VENUE

3. This Court has exclusive jurisdiction over the subject matter of this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). This Court has federal question jurisdiction under 28 U.S.C. § 1331 for this civil action arising under the laws of the United States. Venue is proper in this District pursuant to Section 113(b), 42 U.S.C. § 9613(b) because the Facilities are located within this District and the release of hazardous substances and petroleum hydrocarbons occurred within this District. The amount in controversy exceeds the amount required for adjudication by this Court.

4. The SWDA, Texas Water Code, breach of contract, breach of warranty, and contractual indemnity and quantum meruit claims are so related to the claims within the original jurisdiction of this Court that they form part of the same case or controversy under Article III of the United States Constitution. This Court has supplemental jurisdiction

over the SWDA, negligence, negligence per se, gross negligence, trespass, nuisance, public nuisance and breach of contract claims pursuant to 28 U.S.C. § 1367 and the doctrine of pendent jurisdiction.

PARTIES

5. Plaintiff Aviall is a Delaware corporation and has its principal place of business in the State of Texas.

6. Defendant Cooper Industries, Inc., is a [sic] Ohio corporation doing business in the State of Texas. Defendant may be served with citation by delivering a copy of the citation and this Complaint to its registered agent, CT Corporation System, 801 Dallas Avenue, Houston, Texas 77002.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

7. The subject of this action concerns costs, fees and damages arising out of releases and threatened releases of hazardous materials and petroleum hydrocarbons at four facilities known individually as the Forest Park Facility, Love Field Facility, Lemmon Terminal Facility and Carter Field Facility. At those facilities, Cooper and its predecessors conducted aircraft engine overhaul and/or maintenance operations. All four facilities are located either in Dallas, Texas near Love Field Airport or in Fort Worth in the vicinity of the Dallas/Fort Worth International Airport. The factual background for each facility and the conduct of the parties is alleged below.

Forest Park Facility

8. The Forest Park Facility is located at 6114 Forest Park Road, Dallas, Texas. Beginning in the late 1940's, Texas Aircraft & Engine Company ("TA&EC") and Texas Metal & Manufacturing Company ("TM&MC")

conducted engine rebuilding and metal fabricating operations at that location.

9. In 1949, Cooper's predecessor, Aviation Activities Company ("AAC"), acquired TA&EC and TM&MC. On information and belief, AAC merged AAC, TA&EC and TM&MC and formed a new company known as Dallas Airmotive.

10. Dallas Airmotive, also Cooper's predecessor, continued the engine rebuilding and metal fabricating operations at the Forest Park Facility. These operations consisted, in part, of cleaning engines; painting, stripping and plating engine parts; assembling engines; testing engines; maintaining and operating underground storage tanks and tank farms; and using, receiving and storing hazardous materials and petroleum hydrocarbons.

11. During the course of their operations, Cooper's predecessors disposed of and released hazardous materials and petroleum hydrocarbons at the Forest Park Facility. Without limitation, Cooper's predecessors buried drums of waste containing hydrochloric acid; dumped spent trichloroethylene ("TCE") used in their plating operations onto the bare ground; released into the environment TCE used to wash engines located in test cells; allowed petroleum storage tanks to overflow their contents onto the ground; buried silver plating sludges in soils; and corroded drains with acids while releasing into the drains metals, plating solutions and solvents.

Carter Field Facility

12. In 1955, Cooper's predecessor, Southwest Airmotive Company ("Southwest Airmotive"), began aircraft engine maintenance operations at Carter Field located at 15225 F.A.A. Boulevard, Forth Worth, Texas.

13. At the Carter Field Facility, Cooper's predecessor assembled, disassembled and tested aircraft engines and used, received and stored hazardous materials and petroleum hydrocarbons.

14. During the course of such operations, Cooper's predecessor released and disposed of hazardous substances and petroleum hydrocarbons into the environment. Such releases and disposals include, but are not limited to, overfilling of storage tanks with jet fuel, releasing of hazardous substances into drains, and periodic overflowing of an oil/water separator with hazardous materials and petroleum hydrocarbons.

Love Field Facility

15. Beginning in 1931, Cooper's predecessor, Edwin F. Booth, Inc. began piston engine maintenance operations at the Love Field Facility located at 9311 Reeves Street, Dallas, Texas.

16. Southwest Airmotive was subsequently formed from the successor corporation to Edwin F. Booth, Inc., Booth-Herring, Inc. Southwest Airmotive continued aircraft engine overhaul operations at the Love Field Facility and eventually added 3300 Lemmon Avenue, Dallas, Texas to the Love Field Facility.

17. The aircraft engine operations conducted by Cooper's predecessors at Love Field include, but are not limited to, overhauling aircraft engines, which involved cleaning aircraft engines; painting, stripping and plating engine parts; assembling engines; testing engines; refueling of aircraft; maintaining and operating underground storage tanks and tank farms; and using, receiving, and storing hazardous materials and petroleum hydrocarbons.

18. During the course of such operations, Cooper's predecessors overfilled jet fuel storage tanks and disposed of jet fuel onto bare ground, allowed tanks and related piping to leak petroleum hydrocarbons into the surrounding environment, and caused barrels containing chemicals to accumulate and deteriorate on bare ground, leaking their contents into soils and groundwater. Further, Cooper's predecessors overfilled sumps in the plating shop with solvents and plating waste, draining such chemicals into the ground.

Lemmon Terminal Facility

19. The Lemmon Terminal Facility is located at 7511 and 7515 Lemmon Avenue, Dallas, Texas. Beginning in the 1950's, Cooper's predecessor, Southwest Airmotive, conducted aircraft maintenance, fueling and storage at that location.

20. In connection with such operations, Cooper's predecessor overfilled fuel tanks, allowed dripping and spilling of petroleum hydrocarbons onto soils, spilled petroleum hydrocarbons onto the ground in its fueling and weed control activities, and allowed tanks and piping to deteriorate, thereby releasing petroleum hydrocarbons into soils and potentially groundwater. In addition, Cooper's predecessors released non-halogenated solvents into soils.

Cooper's Acquisition of the Forest Park Facility

21. In 1970, Cooper purchased Dallas Airmotive and merged Dallas Airmotive into Cooper. As a result of this merger, Cooper assumed all obligations of and belongings to Dallas Airmotive, including the environmental liabilities relating to the Forest Park Facility.

22. After the merger, Cooper continued operations and purchased additional, adjacent property at the

Forest Park Facility and continued to release and dispose of hazardous materials and petroleum hydrocarbons into the environment.

Pollution at the Forest Park Facility by Cooper and its [sic] Predecessors

23. As a result of the acts and omissions of Cooper and its predecessors, hazardous materials and petroleum hydrocarbons released by Cooper and its predecessors at the Forest Park Facility have been detected in groundwater and soil at the facility including, but not limited to, phase separated hydrocarbons, chlorobenzenes, cis-1,2-dichloroethene (cis-1,2-DCE), perchloroethene, TCE, 1,1-dichloroethene (1,1-DCE), vinyl chloride, and hexavalent chromium. Certain hazardous materials released at the Forest Park Facility by Cooper and its predecessors have migrated through groundwater off of the Forest Park Facility property.

Cooper's Acquisition of the Carter Field, Love Field and Lemmon Terminal Facilities

24. In 1973, Cooper purchased the stock of Southwest Airmotive, Inc. As a result of the stock purchase, Cooper assumed the obligations and liabilities of Southwest Airmotive at the Carter Field, Love Field and Lemmon Terminal Facilities.

Cooper's Pollution of the Carter Field, Love Field and Lemmon Terminal Facilities

25. Further, Cooper continued the operations at the Carter Field, Love Field and Lemmon Terminal Facilities and continued to dispose of and release hazardous materials and petroleum hydrocarbons into the soils and groundwater at the Facilities.

26. As a result of the operations of Cooper and its predecessors at the Carter Field Facility, elevated concentrations of total petroleum hydrocarbons, benzene, toluene, ethylbenzene, and xylenes were identified in soils at the Carter Field Facility. Further, groundwater monitoring wells have identified the on-site presence of 1,1-DCE, vinyl chloride, dissolved-phase hydrocarbons and halogenated solvents at the Carter Field Facility.

27. As a result of the operations of Cooper and its predecessors at the Love Field Facility, unsaturated halocarbons including 1,1-DCE, cis-1,2-DCE, perchloroethene, TCE, petroleum hydrocarbons and vinyl chloride have been detected in soils. Certain unsaturated halocarbons and dissolved-phase hydrocarbons have also been detected in groundwater at the Love Field Facility. Further, four hydrocarbon plumes exist in the soil and groundwater at the Love Field Facility.

28. As a result of the acts and omissions of Cooper and its predecessor at the Lemmon Terminal Facility, gasoline, jet fuel, acetone, and non-halogenated solvent methylethylketone have been detected in soils in and around the on-site sewer catch basins and/or tank farm, among other areas.

29. The contamination caused by Cooper and its predecessors at the Facilities constituted unauthorized discharges prohibited by applicable law, the Texas Water Code Section 26.121 and Fort Worth City Code, Chapter 49 and/or Dallas City Codes, Chapter 7A.

Aviall's Acquisition of the Facilities from Cooper - The Asset Purchase Agreement

30. In 1981, Aviall (through Aviall's predecessor, Aviation Power Supply, Inc.) purchased certain assets of

Cooper, including the operations at the Forest Park, Love Field, Lemmon Terminal and Carter Field Facilities.

31. Aviall and Cooper entered a written Asset Purchase Agreement, dated December 10, 1981 ("Agreement") which set forth the terms and conditions of the sale. Pursuant to the Agreement, Cooper retained all liabilities arising out of pre-closing environmental contamination.

32. Additionally, Cooper represented, in consideration for the Agreement, that Cooper was not in violation of any law, regulation or requirement relating to the Facilities, including without limitation applicable environmental protection laws and regulations. This representation was false. In fact, at the time of closing the Agreement, Cooper was in violation of environmental protection laws and regulations.

33. In consideration for the Agreement, Cooper entered into an "affirmative covenant" that, prior to closing, Cooper would comply with all legal requirements and contractual obligations applicable to the purchased assets. In fact, Cooper did not comply with all legal requirements and contractual obligations prior to the closing date.

34. In the Agreement, Cooper agreed to promptly inform Aviall in writing of all material variances from the representations and warranties contained in Article 4 of the Agreement. In fact, Cooper failed to inform Aviall of material variances in environmental compliance from the representations made in Section 4.09(f) of the Agreement.

35. Cooper has refused to honor and follow the Agreement and its obligations under Texas and federal laws by failing to recognize, accept and undertake any environmental responsibilities associated with pre-closing

disposals and releases of hazardous materials and petroleum hydrocarbons at the Facilities.

Aviall's Sales of the Facilities and Standing to Sue

36. In 1995 and 1996, Aviall entered two separate sales through which it sold all of its interests in the Facilities. Under the terms and conditions of such sales, Aviall has retained pre-closing environmental obligations with respect to the Facilities. Accordingly Aviall has standing to prosecute this action.

Aviall's Costs

37. Aviall has cooperated with the State of Texas to investigate and clean up the aforementioned contamination. Thus far, Aviall has incurred over $5,000,000 in costs to respond to, investigate, and remediate contamination at the Facilities. Aviall anticipates that such costs could exceed $21,000,000. Further, Aviall has suffered diminution in value of the Facilities through the 1995 and 1996 sales and the risk of liability to off-site landowners.

38. Aviall has incurred response costs consistent with the National Contingency Plan ("NCP") pursuant to CERCLA and will incur further response costs consistent with the NCP pursuant to CERCLA in the future, as well as costs reimbursable under the laws of the State of Texas.

39. The response, investigation and remediation costs incurred by Aviall were also reasonable, necessary and required by the Texas Natural Resource Conservation Commission ("TNRCC") or its predecessors.

40. A "disposal" and "release" and/or threatened release of "hazardous substances" and or "hazardous waste" has occurred at the Facilities as defined by Sections 101(14), (22), and (29) of CERCLA, 42 U.S.C. §§

9601(14), (22), and (29) of CERCLA and by TEX. HEALTH & SAFETY CODE ANN. Sec. 361.003.

41. Cooper is a person who is a responsible party under Section 107(a), 42 U.S.C. § 9607(a), of CERCLA as a past owner and operator of the Facilities at the time of disposal of hazardous substances and as an arranger for disposal of hazardous substances at the Facilities.

42. Forest Park, Love Field and Carter Field each constitute a "facility" as required by Section 107(a), 42 U.S.C. § 9607(a), of CERCLA. Hazardous substances have come to be located at the Facilities.

43. Aviall has incurred recoverable response costs in responding to the contamination at the Facilities that are consistent with the NCP, 40 C.F.R. Part 300.

FIRST CLAIM FOR RELIEF AGAINST COOPER
(Breach of Contract by Cooper)

44. Aviall incorporates the averments of Paragraphs 1-43 as if set out verbatim.

45. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper retained all risk of costs, damages and liabilities arising out of pre-closing disposals of hazardous materials and contamination.

46. Cooper agreed to retain all liabilities or obligations (i) not expressly assumed by Aviall under the Agreement, (ii) those liabilities and obligations covered by Cooper's insurance, and/or (iii) all liabilities or obligations constituting a violation of federal, state or local law or requirement of any governmental authority. Additionally, in the Agreement, Cooper falsely represented that it was not in violation of any law, regulation or requirement relating to the Facilities, including, without limitation, applicable

environmental protection laws and regulations. Moreover, Cooper agreed to promptly inform Aviall in writing of all material variances from the representations and warranties contained in Article 4 of the Agreement. Notwithstanding this Agreement, Cooper entirely failed to inform Aviall of the material variances from its representations and warranties of environmental compliance.

47. Aviall has incurred costs and liabilities related to Cooper's violation of applicable law and governmental authorities' requirements governing Cooper's acts at the Facilities. Such costs and liabilities arise out of Cooper's acts and omissions resulting in the contamination of soils and groundwater at the Facilities. Moreover, Aviall itself never agreed to assume such costs and liabilities under the Agreement.

48. Aviall has requested that Cooper undertake its obligations and liabilities under the Agreement. Cooper has breached its duties under the Agreement by refusing to assume and satisfy such obligations and liabilities. Moreover, by refusing to honor its obligations, Cooper has engaged in an anticipatory breach of the Agreement, thereby entitling Aviall to recover damages for costs to be incurred in the future as a proximate result of Cooper's anticipatory breach.

49. Aviall has incurred and continues to incur substantial damages proximately caused as a result of Cooper's breaches of the Agreement. In reasonable probability, Aviall will incur substantial damages in the future as a result of Cooper's anticipatory breach of the Agreement.

SECOND CLAIM FOR RELIEF AGAINST COOPER
(Breach of Warranty)

50. Aviall incorporates the averments of paragraphs 1-49 as if set out verbatim.

51. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper expressly warranted that it was not in violation of any applicable law, regulation or requirement relating to the operation of the Facilities, including applicable environmental laws and regulations.

52. By releasing petroleum and hazardous substances into the ground and groundwater at the Facilities, Cooper violated applicable environmental laws and regulations.

53. Accordingly, Cooper breached the warranty set forth in the Agreement regarding compliance with applicable environmental laws and regulations. Moreover, although Cooper agreed to notify Aviall about any material variances from the warranties regarding environmental compliance, Cooper has never notified Aviall of regarding its non-compliance. As a result, Aviall has incurred and will continue to incur substantial damages proximately caused as a result of this breach of warranty.

THIRD CLAIM FOR RELIEF AGAINST COOPER
(Contractual Indemnification)

54. Aviall incorporates the averments of Paragraphs 1-53 as if set out verbatim.

55. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper agreed to indemnify Aviall against any loss, liability, damage or expense that Aviall may incur as a result of a breach by Cooper of any

representation, warranty, covenant or agreement contained in the Agreement.

56. By refusing to honor its retained environmental liabilities resulting from Cooper's pre-closing activities, and by the other breaches, acts and omissions alleged herein, Cooper breached representations, warranties, covenants and agreements set forth in the Agreement.

57. Accordingly, Cooper is required under the Agreement to indemnify Aviall for all past and future losses, damages and expenses incurred as a proximate result of Cooper's breach of those representations, warranties, covenants and agreements.

FOURTH CLAIM FOR RELIEF AGAINST COOPER
(Declaratory Judgment)

58. Aviall incorporates the averments of Paragraphs 1-57 as if set out verbatim.

59. This claim is for declaratory judgment pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 9613 for the purpose of determining a question of actual controversy between and among the parties.

60. An actual controversy has arisen and now exists between Aviall and Cooper in that Aviall contends and Cooper will deny or will likely deny:

(A) that, as between the parties, responsibility for certain releases or threatened releases of hazardous substances at or from the Facilities has been retained by Cooper; and

(B) that as a result, Cooper is obligated to indemnify Aviall for any sums that it has paid or may be compelled to pay as a result of such

release or threatened release of hazardous substances and/or hazardous and solid wastes at or from the Facilities;

(C) that Cooper is liable for certain response costs incurred by Aviall, or damages sustained by Aviall under CERCLA, SWDA and the Texas Water Code;

(D) that Cooper is liable for certain response costs incurred by Aviall, or damages sustained by Aviall in the future under CERCLA, SWDA and the Texas Water Code;

(E) that Aviall is entitled to a declaratory judgment of future liability at the Facilities that will be binding on any subsequent actions to recover response costs incurred at the Facilities in the future.

61. Aviall therefore requests that this Court enter a declaratory judgment declaring that Cooper is liable for all or part of the costs, plus interest, of past, present and future actions taken by Aviall, or any other person or entity, to responses to releases or threatened releases of hazardous substances and solid and hazardous wastes at or proximately caused by conditions that existed before December 10, 1981 in connection with the Facilities for any past or future response costs incurred or damages sustained that arise from activities at the Facilities.

FIFTH CLAIM FOR RELIEF AGAINST COOPER
(Liability under CERCLA)

62. Aviall incorporates the averments of paragraphs 1-61 above as if set forth verbatim.

63. Pursuant to CERCLA, 42 U.S.C. § 9613(f)(1), Aviall is entitled to seek contribution from Cooper, as a person liable or potentially liable under CERCLA, 42 U.S.C. § 9607(a), for any response costs and other liability Aviall has incurred or may incur under CERCLA in connection with the Facilities.

64. Aviall is entitled to contribution for all such response costs and other liability on the basis of equitable factors, including, but not limited to:

(A) for over thirty years, Cooper and its predecessors owned and operated the Facilities during which time they managed and controlled waste handling and disposal practices at the Facilities and generated contamination at and from the Facilities;

(B) in contrast to Cooper, Aviall has cooperated with government efforts regarding investigation and cleanup of the Facilities;

(C) if Aviall bore the response costs for which Cooper is directly responsible, Cooper would be unjustly enriched and obtain a windfall at Aviall's expense;

(D) Cooper and Aviall agreed pursuant to the Agreement that Cooper would bear all liabilities as between them for response and remedial action costs arising out of Cooper's pre-closing operation and ownership of the Facilities.

65. Both the Attorney General of the United States and the Administrator of the environmental [sic] Protection Agency have been notified of the action and

provided with a copy of the Original Complaint and First Amended Complaint.

SIXTH CLAIM FOR RELIEF AGAINST COOPER
(Contribution Under the Texas Solid Waste Disposal Act)

66. Aviall incorporates the averments of Paragraphs 1-66 as if set out verbatim.

67. Pursuant to TEX. HEALTH & SAFETY CODE ANN. Section 361.344(a), as amended, Aviall is entitled to recover from Cooper the costs of the removal or remedial actions conducted by Aviall in connection with its former Facilities.

68. Such removal and remedial actions were approved by the TNRCC and were reasonable and necessary to address a release or threatened release of a solid waste as defined by the SWDA. Aviall is entitled to apportionment of costs as provided b [sic] the SWDA.

69. Aviall is entitled, pursuant to 28 U.S.C. §§ 2201-2202 and TEX. CIV. PRAC. & REM. CODE ANN. Section 37.004, to a declaratory judgment as to Cooper's liability for response and remedial action costs and other liabilities in connection with the Facilities, along with related relief as is requested herein. Also, Aviall seeks recovery of costs and reasonable and necessary attorney's fees pursuant to TEX. HEALTH & SAFETY CODE ANN. Section 361.344(a) and TEX. CIV. PRAC. & REM. CODE ANN. Section 37.009.

SEVENTH CLAIM FOR RELIEF AGAINST COOPER
(Contribution Under the Texas Water Code)

70. Aviall incorporates the averments of Paragraphs 1-71 as if set out verbatim.

71. Cooper, while owner and operator of the Facilities, placed, used and maintained storage tanks at the Facilities. As a result of its actions, regulated hazardous, toxic or otherwise harmful substances, including without limitation, jet fuel, diesel, gasoline, solid and hazardous waste and hazardous substances, were released, causing or threatening to cause serious groundwater and other contamination. The release and threatened releases present substantial danger to the public health, welfare, or the environment.

72. Cooper failed to take corrective action at the Facilities. Aviall has incurred reasonable and necessary response costs by taking corrective action in response to releases or threatened releases of hazardous substances and/or hazardous and solid wastes. Aviall will continue to incur such costs in eliminating releases and threatened releases.

73. An actual and judicial controversy exists between the parties concerning liability for costs incurred by Aviall, including attorneys' fees and interest, which Aviall contend are due it from Cooper pursuant to the Texas Water Code § 26.3513, and Aviall seeks contribution against Cooper, as the former owner and operator of the Facilities for the corrective action costs incurred. Pursuant to Texas law, Aviall is entitled to judgment in its favor and against Cooper for contribution, adjudging and deeming that Cooper is liable for the amounts expended by Aviall in response to the releases or threatened releases, plus attorneys' fees, court costs, and interest therein, plus any future costs incurred by Plaintiffs.

EIGHTH CLAIM FOR RELIEF AGAINST COOPER
(Quantum Meruit)

74. Aviall incorporates the averments of Paragraphs 1-73 as if set out verbatim.

75. Aviall has furnished and is furnishing valuable services and materials to Cooper by cleaning up the Facilities, an obligation for which Cooper is partially liable.

76. Theses [sic] services and materials were performed and are performed to the benefit of Cooper and enjoyed by Cooper.

77. Aviall notified Cooper of the services and materials and expected to be paid by Cooper for such services.

78. Accordingly, as an alternative to the other above-mentioned claims, Aviall is entitled to all costs and expenses it has incurred under the theory of quantum meruit.

NINTH CLAIM FOR RELIEF AGAINST COOPER
(Attorneys' Fees)

79. Aviall incorporates the averments of Paragraphs 1-78 as if set out verbatim.

80. Aviall has repeatedly demanded that Cooper comply with the Agreement and pay Aviall for Cooper's share of its response costs incurred to clean up the Facilities.

81. Because Cooper repeatedly refused to honor its commitments, Aviall retained the undersigned counsel to pursue this litigation on its behalf.

82. Aviall has paid or agreed to pay the undersigned counsel reasonable and necessary fees and expenses incurred in connection with this action.

83. Aviall is entitled, pursuant to CERCLA, 42 U.S.C. § 9613(g)(2), 28 U.S.C. §§ 2201-2202, TEX. CIV. PRAC. & REM. CODE ANN. sections 37.009 and 38.002, section 7.02(a) of the Agreement, and TEX. HEALTH & SAFETY CODE ANN. Section 361.344, as well as under the SWDA and the Texas Water Code, to a judgment against Cooper for all attorneys' fees and costs incurred in association with these claims.

WHEREFORE, Aviall prays for the relief requested above, for costs, attorneys' fees, interest as allowed by law and for general relief.

DATED: June __, 1999.

Respectfully submitted,

/s/_____
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AVIALL SERVICES, INCORPORATED	)	CIVIL ACTION NUMBER
	)	3:97-CV-1926-D
VERSUS	)	
	)	January 5, 2000
COOPER INDUSTRIES, INC.	)	

TRANSCRIPT OF ORAL
ARGUMENT BEFORE THE
HONORABLE SIDNEY A. FITZWATER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff;	DALE E. STEPHENSON SQUIRE, SANDERS & DEMPSEY, L.L.P. 6250 Texas Commerce Tower 600 Travis Street Houston, Texas 77002 713/546-5858
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Court Reporter:	PAMELA J. WILSON, CSR 1100 Commerce Room 15A3 214/415-1884

PROCEEDINGS

THE LAW CLERK: All rise.

The United States District Court for the Northern District of Texas is now in session, the Honorable Judge Sidney A. Fitzwater presiding.

Let us pray. God save the United States and this Honorable Court.

THE COURT: Be seated, please.

This is Aviall Services versus Cooper Industries.

We'll begin with Mr. Stephenson.

MR. STEPHENSON: May it please the court. Plaintiff Aviall and defendant Cooper Industries, Inc. have filed cross motions for summary judgment addressing many of the same issues. Aviall seeks partial summary judgment only with respect to five of the nine claims asserted in the first amended complaint: Breach of contract based on alleged retaining liabilities; contractual indemnification under the written contract; contribution under Section 113 of the Comprehensive Environmental Response Compensation and Liability Act; and contribution under state law claims for the Texas Solid Waste Disposal Act and the Texas Water Code. The statutory environmental claims are all based on strict liability provisions. Aviall does not seek summary judgment with respect to the other four causes of action asserted in its amended complaint: Breach of warrant, declaratory

judgment, quantum meruit and attorneys fees.

In constrast, Cooper seeks summary judgment on its favor in all the claims asserted in the amended complaint.

THE COURT: Mr. Stephenson, what's the basis for the subject matter jurisdiction of the court in this case?

MR. STEPHENSON: Subject matter jurisdiction arises under the Comprehensive Environmental Response Compensation and Liability Act, Section 113.

THE COURT: All right. So it's federal question jurisdiction?

MR. STEPHENSON: That's correct.

THE COURT: And if you are correct that there is not a viable CERCLA claim, does the court have discretion to dismiss the balance of the case without prejudice?

MR. STEPHENSON: Absolutely, under UMW V. Gibbs, I believe.

THE COURT: And what do you understand the declaratory judgment claim of the plaintiff to be?

MR. STEPHENSON: The declaratory judgment claim is for future costs to be expended at the property. It's based on a provision in Section 113(g) of CERCLA which relates solely to private party direct causes of action under Section 107. Since their remaining claim is under Section 113 and there is no parallel provision for declaratory judgment under CERCLA, that section is inapposite.

[3]

THE COURT: Now, when you say there is no declaratory judgment provision under CERCLA, as I read that provision there is a remedy of declaratory judgment that's available, but you contend that that is tied to a 107 claim; is that correct?

MR. STEPHENSON: It is a section that relates solely to direct causes of action under Section 107(a). Immediately following -- it is limited to this subsection. Immediately following the subsection which refers to statutory of limitations and other things for contribution actions under Section 113(f) does not have an equivalent provision.

THE COURT: What do you understand this combined 107/113 claim to be that Aviall brings?

MR. STEPHENSON: The combined -- I don't think there -- there is a -- is a combined claim. I think the law is well established that to pursue a direct cause of action under Section 107 you have to be either an innocent party or the United States Government, and we don't have that -- or an innocent -- or an innocent party, and we don't have that in this case. In fact, Aviall dropped its Section 107 complaint in the original complaint. It was originally count 1 of the complaint.

THE COURT: Aviall continues to refer to 107 in connection with the 113 claim. I used the word "combined,"

[4]

another way might be hybrid or something else.

MR. STEPHENSON: Sure. I think that under the cases cited that you have to have a threshold activity that gets a party to assert a contribution claim: That is, you have to have either an enforcement action against a party for their own direct liability for which they can then seek contribution; you can have an administrative enforcement action by the United States; you can have a lawsuit by another party, an innocent, private party that -- pursuing an act under 107, and then the defendant in that action can have a right to contribution under Section 113. None of those circumstances exist in the present case. This is solely a private party taking action on its own property and seeking to manufacture the CERCLA claim.

THE COURT: Okay.

MR. STEPHENSON: Thank you.

Aviall doesn't dispute at all that it polluted these properties, and that's why it can't have its own direct private party claim as an innocent party.

18 years ago Aviall purchased the properties and knew exactly what it was purchasing. It was an industrial property of 50 underground storage tanks, industrial operations for plating, handling solvents and other materials. Indeed the president of Cooper went over to become the president of Aviall on the purchase. They knew

[5]

exactly what they were purchasing and operating. As the environmental laws emerged over time, particularly with respect to underground storage tanks in the late 1980s, some seven or eight years after the purchase, Aviall systematically, methodically removed underground storage tanks, cleaned up contaminated soil from the leaks in the aging tanks during its watch and incurred those costs in the ordinary course of business.

The comprehensive written contracts negotiated between the two parties in this case are really the heart of the issue. Indeed, Aviall agrees that this is primarily a contract case, and so we'll focus on those issues initially. The contracts may be complex but they aren't ambiguous. Aviall argues that Cooper is trying to avoid its legal obligations, but the thrust of Aviall's argument makes clear that it's trying to rewrite the terms of the agreements.

THE COURT: Let me turn if I might to Section 103.(b), Roman Numeral X.

MR. STEPHENSON: Yes.

THE COURT: You've made an argument in your brief where you attempt to draw a distinction between retained versus not assumed. And I think you criticized Cooper's brief – Aviall's brief, excuse me, for repeatedly referring to retained liabilities when you contend the word retained is not in the agreement.

Would you explain to me what you mean by that distinction? Because the other side of that is if you don't assume it, the other party kept it.

MR. STEPHENSON: What Cooper kept was obligations for a specific period of time under the indemnity provision of the agreement. Anything that was not an assumed liability falls over to be handled under Section 7.02 of the purchase agreement. And matters which were other than assumed liabilities had a five year from the time -- date of closing window in which to assert a claim. That would have expired in 1986. It went away along before Cooper -- Aviall ever contacted Cooper a decade later.

So what I mean is that retained -- retained only has the concept of the indemnity that is woven into the agreement. It doesn't have a standalone implied breach of contract connotation that swallows the carefully crafted terms for recovery.

THE COURT: And you would say that the obligation to indemnify is the same; is that right?

Because they attempt to distinguish between an obligation to indemnify and a retained liability as I understand it.

MR. STEPHENSON: That's correct. Well, it's one of two things. If the claim comes under section -- subsection (x) that you're referring to, that's an other

than assumed liability. Those -- those had an express five year window for bringing a claim for that. If it's something other than -- other than those enumerated things in subsection B, then the comprehensive release that the parties negotiated in 1982, October of 1982, was a complete release and forgiveness of all agreements or other terms in the contract. So it's one or the other.

THE COURT: And they say there is language in the release that says you acknowledge and will continue to honor liabilities that you retain.

MR. STEPHENSON: And the second sentence of the release says "subject to the applicable time limits." I mean, it's express in the release that anything that is left under the non-assumed liabilities is subject to the applicable time limits, in this -- in this context five years.

This court recently took a look at the vendor property obligations in a slightly different context. It involved leaking underground storage tanks in the Owens versus the Estate of Irwin matter. In recognizing the general rules, a grantor of real property isn't liable for dangerous or defective conditions on land once the grantee has taken possession of the property, unless the grantor knew of dangerous conditions at the time of the transfer or acted to conceal or failed to disclose it. We don't have that

circumstance in this case. There is no allegation of misrepresentation. There is no allegation of fraud. A similar result was reached in Jones versus Texaco in the Southern

District of Texas in 1996, 945 F. Sup 1037 and Hicks versus Humble Oil in the Texas appellate court, 970 S.W.2d 90.

The analogy here is Aviall bought property with specific contract rights for recovery if something went wrong for one year or for five years or was released. If Aviall in doing construction on its property discovered a pot of gold on the property, I don't think they would be giving it back to Cooper because it was a windfall to them. Likewise, if a homeowner buys a house and later the roof leaks, it doesn't undo the deal.

The real question here: Does the contract unwind the general rule that a person buys what they get?

We think it is clear that application of the contract on its face requires -- means that there is no -- no contractual recovery for Aviall.

THE COURT: Let me jump back to something you just said, the general rule that somebody gets what they buy.

MR. STEPHENSON: Correct.

THE COURT: Their argument though under Texas corporate law is that a successor corporation doesn't assume certain liabilities; so is that analogy really correct?

MR. STEPHENSON: I think it is, because the liability that they got was the property that they bought.

Their liability under CERCLA arises not only because they contaminated the property themselves but because they owned it. CERCLA is a strict liability statute that creates liabilities for owners. And they got that as part of the evolving time period.

There hasn't been a CERCLA claim brought against Cooper in this case. There hasn't been a CERCLA claim brought against Aviall in this case. They simply did something with their own property. They got what they got. They fixed it up over time. They complied with emerging rules for underground storage tanks and other things. And finally they sold their properties in 1995/'96. And the only reason they're continuing to do anything with those properties is because they contractually agreed with the buyers to do that. They cut the deal, and now they're trying to make somebody else pay for any cost differences that they encountered. They did this work normally and systematically for more than a decade before they ever contacted Cooper. It was the ordinary course of business as far as they were concerned.

We note in the briefs there is a single environmental provision in the contract which relates to the representation for compliance with environmental safety laws

[10]

and regulations, and that expired under the one year statute of limitations in Section 7.02(a) of the contract.

THE COURT: And they say that they're not suing you based on that provision.

MR. STEPHENSON: Well, the complaint on its face alleges that.

THE COURT: I'm trying to remember which brief it was I read, but in one of the briefs they say --

MR. STEPHENSON: They say they no longer believe we misrepresented that in the summary judgment brief, that's correct.

THE COURT: And I think the reason they do that is to bolster the argument that the time limits don't apply.

MR. STEPHENSON: That's certainly true.

But the key time limit, here again, is the other than assumed liability five year time limit.

Coupling that with the release, "All representations, warrants, covenants, agreements --- "

THE COURT: Slow down a little when you read for the reporter.

MR. STEPHENSON: Yeah. "-- contained in the asset agreement are deemed to be fully satisfied forever. Aviall releases Cooper from any and all allegations or claims to indemnify Aviall for any breach of any representation, warranty, covenant or agreement of Cooper contained in or

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related to the asset agreement."

Even if the express term limits in the contract did not apply, the general statute of limitations would be four years in the State of Texas, triggering from the time the injury was caused to the property, again, expiring in 1985. We raised in the brief also the issue of the express strict liability doctrine in the State of Texas applicable to these. We do need to advise the court that yesterday the Fifth Circuit reversed the decision in Fina versus Arco.

THE COURT: Yeah, I saw that. That was Judge Wiener, I think.

MR. STEPHENSON: That's correct. That's correct. Aviall had argued that here the contract did not specifically mention CERCLA liability nor under the authorities must it do so, citing Fina versus Arco. The Fifth Circuit reversed, holding that general contractual language in two purchase agreements did not cover strict liability under CERCLA pursuant to, one contract, Delaware's clear and unequivocal standard, and in the other contract, Texas's more stringent express strict liability standard. That follows the Houston Lighting and Power decision from the Texas Supreme Court in 1994, refusing to enforce a strict liability claim on indemnity provision expressly -that expressly covered negligence claims.

THE COURT: Let me go back to CERCLA for a minute.

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You make the argument that the failure to give notice deprived the court -- and deprives the court of subject matter jurisdiction.

MR. STEPHENSON: Right.

THE COURT: Would you explain the basis for that argument and address whether those subject matter jurisdiction cases are distinguishable because they deal with different types of statutes?

MR. STEPHENSON: They are certainly -- the holdings are different in that they are citizen suit provisions under the Clean Water Act, the Clean Air Act, and other statutes that allow a private party to stand in as a private Attorney General. But the exact provision that we're talking about here in Section 113(1) of CERCLA is incorporated into the citizen suit provision of CERCLA in Section 310 and it is held to be a concurrent requirement by USEPA.

Here, in the CERCLA context, the agency and the Attorney General responsible for overseeing this statute didn't know about the claims being made here for 21 months, until it was brought to their attention after we brought it to Aviall's attention. Similarly, the lack of public participation on the site kept all of the public shielded from what was going on here.

My guess is that the United States, administrator of

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EPA, and the Attorney General don't know that there is a second amended complaint in this case alleging that notice 21 months late is okay. I haven't seen any indication that Aviall has served that complaint on the United States.

The idea behind provisions like this is to give the government a chance to do something. The only case that Aviall cited with respect to this was a -- where individual plaintiffs brought a claim in the Green matter in Kansas. And in that case, the court allowed -- or directed the parties to go back and depose EPA -- an EPA official to see if they cared about the site or not. That was the relief granted in that case.

Here you can look at analogous statutes that aren't citizen suit provisions. We looked at one maritime --

THE CLERK: Three minutes.

MR. STEPHENSON: Thank you.

We looked at one maritime matter where less than 120 days was found to be too long.

And I would like to reserve the remaining 10 minutes, r if you had a follow-up question

THE COURT: You may reserve up to ten minutes under the court's order.

MR. STEPHENSON: Thank you.

THE COURT: All right. Thank you. Mr. Faulk.

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MR. FAULK: Thank you, Your Honor.

If the court please, I -- it appears the court is familiar with the contract provisions, but we've prepared a short excerpt of contract highlighted sections that we would like to tender to the court.

Your Honor, I -- I think as has during the course of the questioning of this contract are things that are of the case. And we believe that it redundant perhaps, to look at the specific interpretation that Aviall places on these contract provisions and then show how those contract provisions support the positions we have taken.

Clearly in Section 1.03(b), Aviall did not assume certain responsibilities under the contract. And there were three different types of liabilities that weren't assumed under that particular type of -- part of the contract. And the catchall one is, as the court properly noted, Section which states that we're not responsible for any liability of the seller unless it is expressly assumed by the buyer.

There is also a provision, Section 4, that deals with liabilities of the seller arising as a result of preclosing conduct and also with respect to insured liabilities under Section 3 of the contract.

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The interesting thing about those obligations, we believe that there's no other place in the contract where environmental liabilities are discussed with any particularity at all. And the only place that that in fact does come in, arguably from Mr. Stephenson's client, is in the phrase "ordinary course of business" under the assumed liabilities section, Section 1.03(a).

For several good reasons, Your Honor, the question of ordinary course of business does not apply in this situation. The most critical point is Section 4.05(c) of the contract, in which the parties define what ordinary course of business is. And in that provision, ordinary course of business specifically excludes breach of contract claims, torts, claims or lawsuits, or such extraordinary liabilities as you would find under that particular definition. So the contract itself says that this is not the sort of thing -- a liability arising in the ordinary course of business.

The ordinary course of business *distinction* also covers -- only deals with balance sheet liabilities, as the contract specifically says. And no such nondisclosed and at the time nonexisting environmental liability such as this would ever be disclosed on a balance sheet as the parties anticipated.

Now, the contracts definition excluding extraordinary

liabilities is very consistent with the Mudgett case and the Tuscarosa cases from Texas which specifically hold that torts, for example, are not things that are in the ordinary course of business under these sorts of situations. Even getting down to a dictionary definition, the transaction of business seems to be the focus here, and this sort of waste disposal activity doesn't really apply as a transaction of business with third parties or a profit-generating activity which would be subject to it. So we submit for those reasons that environmental liabilities are not specifically allocated in this contract.

Therefore, we have to construe the contract according to what Aviall and the parties intended. And they intended that Aviall assume only those liabilities which were expressly assumed, and that was clearly not.

The court asked a question about whether or not retaining the liabilities means the same thing as not assuming them. Let me point out that the release that they executed, as the court noted, definitely says that Cooper continues to acknowledge its obligations under those provisions for liabilities not assumed by Aviall. And the course of dealing between the parties, for five separate times after this contract was executed, when Aviall tendered environmental claims to Cooper, they accepted those using the words that these are retained liabilities which were not

assumed by Cooper. So it's not a word or a play on words, Your Honor, that this is something we have conjured up here. We're using words that were first used by Cooper both in the release and in the correspondence regarding these other environmental claims that came up.

If I may, Your Honor, let me talk about the indemnity provision specifically. There has been some discussion by Mr. Stephenson that the claim made in the indemnity language here is a claim that is regulated by either a one or a five year plan.

In the handout that I have given you, on the 21st page is the section involving indemnity. And our claim is not based, Your Honor, on either of the provisions that are regulated by those time periods.

Our claim is based -- under indemnity is based under 7.02(a), and there is a small subsection 2 in that section which says we can sue them, "as a result of the breach by seller of any representation, warranty, covenant or agreement contained in this agreement."

We're not suing them under little Section 1, which as the court will see below in 17.02(b)(a)(1) provides a one year limitations period contractually, and in Section (c), Section (a)(3) provides a five year statute. But under Section 2 there is no contractual time limitation stated in the contract.

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Now, I've done some thinking about this to the point of saying where do the parties' minds meet here. Is there a way to say why that particular provision doesn't have a specific limitation. And the answer is very lucid, and it's down in Section 7.02(e). And if the court will take a look at that, the court will see that in that provision, with the exception of Section 5 of the contract, which doesn't apply in this situation, that Aviall is obliged to indemnify Cooper for the same conduct, the same language. I t is a mirror image of the provision in Section 2 above, and there is no time limitation set on that.

What does that mean?

To me, Your Honor, I think it's reasonable to say that under those circumstances that indicates that with respect to claims that were unknown at the time of closing, with respect to actions that might arise in the future as a result of pre-closing conduct, that the parties did not intend to be bound by contractual time limitations on that particular type of

activity. And to me that is one of the clearest -- that mirror image is one of the clearest examples of the parties having equal rights to come back and assert actions notwithstanding the passage of these one and five year limitations.

THE COURT: Let me jump over for a moment to the four year statute of limitations under Texas law and ask

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that you address Cooper's argument.

MR. FAULK: Well, Cooper's argument is based upon the fact that according to them Aviall incurred a legal injury at the time the injury occurred or at the time the contamination was occurring or in fact discovered. That is the general rule, Your Honor, under tort law, and I'm not going to argue with that. But for a breach of contract claim, the Texas law, number one, says that a cause of action occurs on breach of the contract.

And the cases from Texas, the Permian case, as well as the Fifth Circuit case that we have cited say that when you're dealing with a contract the cause of action does not accrue upon the time that you sustain damage, it doesn't accrue when you first suffer a loss or when you first suffer some sort of contamination; it occurs upon presentment of the claim for enforcement of the contract and upon refusal of the other side to perform.

And within those parameters, we made these presentations to Cooper well within the four year period prior

to the time this lawsuit was filed, by letters in 1995, in 1996. They clearly refused in 1996. This lawsuit was filed in 1997.

THE COURT: Well, they, as I understand it, at least advance three arguments in that connection: One is they distinguish these cases that you rely on; two, they

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characterize your argument as somewhat circular; and three, I think they call it bootstrapping. And when they say you could let these claims go on for eternity, you say, well, no, there's no eternity because there's a limit of four years under the Texas statute.

Now, why isn't there a potential for eternity in that you just let the claims become stale, relevant witnesses die, and then decide at some future point that you will make the demand?

I mean, under your argument aren't you allowed to stretch this out for many years before you make a demand?

MR. FAULK: Your Honor, I certainly do contend that we are allowed to do that.

Before I get directly to the court's question though, let me point out that this eternity argument is not a problem that gave Cooper any pause with respect to environmental liabilities five separate times other than this. There were claims made against Cooper five times prior to the -- to us standing here, once after the time period where the lawsuit here had been filed, and no limitations arguments, no contractual defense arguments, none of those things were

raised by Cooper in that course of dealing and contract, which seems to be the best evidence of how Cooper construes it.

Let me answer the question directly. Your Honor, if

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the-law legally permits the cause of action to accrue upon the presentment of the claim and its declination, it's no different and no more unfair, for example, than making the long-awaited claims that are made against insurance companies for these sort of pollution issues for coverage in other situations. It is not uncommon in environmental liabilities for persons not to discover these sorts of events, and to discover the proper party's culpability until many years thereafter. It is no more unfair to Cooper than it is to hold an insurer responsible and to say that the cause of action you're denied under coverage accrues at such time as the insurer actually denies them.

THE COURT: Let me jump over if I might to CERCLA for a minute, so I make certain I get some questions out, and then I'll get you go back to these arguments, if you would like.

MR. FAULK: Excellent.

THE COURT: First of all, would you address the issue of the court's subject matter jurisdiction. Is this a federal question case where the state claims are supplemental as opposed to diversity of the citizen --

MR. FAULK: It is. It is a federal question issue.

THE COURT: Okay. All right. And what is the nature of your declaratory judgment action as it relates to

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federal claims? I know a component of it is state liability.

Is it a 2201 general garden variety declaratory judgment action?

MR. FAULK: It is, Your Honor, to the extent that it mirrors the relief that we're entitled to under Section 107, which is essentially a finding -- and 113, which is essentially a finding and declaration of Cooper's responsibility as a responsibility part -- party under CERCLA, and -- which is necessary for a finding of contribution. So it is in a sense a mirrored claim of the claim under 107/113.

THE COURT: And then that leads to the question of what is the nature of your claim. I've been calling it a hybrid or a combined claim. Explain what the claim is.

MR. FAULK: The Supreme Court in the King (phonetic) case referred to it as a blended remedy. The claim that we are asserting is a claim under Section 113(f) for recovery of contribution for costs against parties that we can recover from under Section 107.

Section 107, according to the Centurior case out of the Sixth Circuit and the Sun Company case out of the Tenth Circuit, Section 107 is a part of a Section 113 contribution action for that purpose.

The only difference between a cause of action like

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ours, which is brought by one party against another, one PRP against another, and a direct 107 action brought by the government, is that the only relief that we can obtain is a several judgment for that portion of Cooper's responsibility that we have been able to bring forward. That is the cause of action. It is a cause of action that expressly under CERCLA can be brought in the absence of any other civil action.

I refer to it in the brief, Your Honor,. as an initial action for contribution. It is an action by a PRP who has cleaned up, without the necessity of environmental enforcement action prompting it through an order or through judgment and who now has obtained -- obtained a cost and now seeks contribution against another party who is responsible. In that situation both parties are jointly and severally liable and being jointly and severally liable, they are responsibility for contribution according to Section 113.

The Centurior case, Your Honor, is the case of the Sixth Circuit that makes this point I think most eloquently, and the case also specifically holds that some sort of prior action by the government is not required, some sort of prior judgment in a civil action is not required as a prerequisite to this. The case very specifically holds that the only difference is that our recovery is several.

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THE COURT: Do you then concede that you do not have at this time a standalone Section 107 claim?

MR. FAULK: I don't think I would concede it quite that way. I would say we have a 113 claim that is based upon its incorporation of the remedies and rights under 107 according to what the statute provides. I'm hesitant to say that, although I don't think I could maintain a 107 claim standing alone, nor have we ever tried to.

THE COURT: Well, what was the claim that you dropped?

MR. FAULK: Mr. Stephenson has referred to it as a moving target. I apologize it appears that way. We have dropped no claims. The complaint itself very specifically says in its opening paragraph that this is a lawsuit under Section 107 and 113, which, in fact, it is, Your Honor, because you can't discuss 113 in this context without discussing 107, because, as the cases say, 107 is a part of 113 for purposes of causes of action like this.

THE COURT: But in your original complaint there was a claim that does not -- is not phrased the way you currently phrase your complaint. What type of claim did you think it was when you brought it? A 107 claim?

MR. FAULK: I'll be honest with you, Your Honor, I wasn't involved in the case when the original complaint was drafted.

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THE COURT: I didn't mean you personally, I meant you --

MR. FAULK: I do believe that were trying to seek the umbrella relief from -- for -- under both Sections of the provision as they complemented each other. If that was in artfully phrased, that was certainly the intent, was to make sure that Cooper could be shown to be a responsible party under 107 so that we could then obtain contribution under Section 113.

THE COURT: Okay. Let me ask it another way then. You're a very careful lawyer.

If I were to have allowed you to amend again, why would you not, you meaning your client, bring a 107 claim? Without 113.

MR. FAULK: I would not do it because I do not think that -- I think the remedy that the law authorizes here is a 107 claim -- a 113 claim in the -- in the format that we have raised it in our current pleadings.

THE COURT: Is it because you're a PRP?

MR. FAULK: It would be, I believe. I would believe that. It wouldn't bar it, however, for purposes of contribution.

THE COURT: I'm not to that point.

MR. FAULK: Okay.

THE COURT: I am really just trying to understand

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standards.

You asked if there's prejudice in the late notice. Yes, there is prejudice. We pointed it out in our statute of limitations argument: The witnesses have gone away; the facts have gone away; and we're faced with a claim for five million dollars; and -- and the remedies have already been picked and they're being concluded or are concluded at this point. We weren't there. They undertook the work for a decade in the ordinary course of business by their own conduct, and it's their responsibility for the property development.

Thank you very much, Your Honor.

THE COURT: Thank you, counsel.

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(Certification omitted in printing)

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agreement says no course of dealing between the parties -- or among the persons having any interest in this agreement will be deemed effective to modify, amend, discharge any part of this

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agreement or any rights or obligations of any person by reason of. So the argument doesn't fly in terms of contractual analysis. The argument itself is barred by the agreement.

We pointed out that the – Aviall's very uncertain contribution claim can't be asserted because it's not an innocent party. And Aviall has never been the subject of any CERCLA enforcement action or settlement with respect to the environmental conditions of the facility. There is no CERCLA claim, no 107 claim to -- to create the opportunity for contribution.

Mr. Faulk tries to create a hybrid claim, and it flies directly in the face of the OHM Remediation Services decision of the District Court, as recognized by the Fifth Circuit. In that case when a 107 claim went away at the District Court level, the 113 claim was thrown out because it had to be derivative of the 107 lawsuit. There wasn't some hybrid claim that was left over.

And the court noted that Section 113(f) contribution action is derivative of an action under Section 107(a), if only a pending one. Accordingly, the District Court's dismissal of OHM's Section 107(a) action served to void the statutory prerequisite to suit under Section 113(f).

The two cases that were cited by Mr. Faulk as dispositive of this issue that the courts are recognizing

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the hybrid action are inapposite. The Sun case in the Tenth Circuit involved a site that was listed by the United states on the national priorities list of superfund sites. The plaintiffs in that case were issued a Section 106 unilateral administrative order directing them to undertake work at the site. And in the context of their claim against other parties in that case, their 107 claim was thrown out and their 113 claim was allowed to remain, and the only issue was what is the statute of limitations for the 113 claim. It's a legitimate CERCLA claim for contribution. There was the underpinning of federal enforcement in a 106 order.

In the Centurior Services decision in the Sixth Circuit, EPA investigated the Huth oil site, it identified four potentially responsible parties, it issued unilateral Section 106 order directing them to clean up the site.

THE CLERK: Three minutes.

MR. STEPHENSON: Again, their 107 claim was thrown out and the remaining issue was the legitimate contribution action under Section 113(f)(1). Aviall doesn't have the precursor for that kind of an action in this case.

To sum up, Your Honor, the contract makes it clear that there's no contract claim left here. It went away by the terms of the contract. It went away by the express liability doctrine, as recently held in the Fina versus Arco case. And all of the other claims are – don't satisfy the

Company case that we have cited in the brief that allows us to bring this particular cause of action.

THE COURT: Thank you, counsel. Mr. Stephenson.

MR. STEPHENSON: Going back to the contract issues for just a moment, Mr. Faulk attempted to tie in the – the – Aviall's assumption of liabilities for matters incurred in the ordinary course of business, tying it back to the statute of limitations standard.

In fact, the provision in Section 1.03(a)(1) for

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seller's liabilities and obligations incurred after December 31, 1980, in the ordinary course of business is for other than liabilities set forth in the 1.03(b), which is the liabilities not assumed, has a relatively minor role in this case because Cooper hasn't incurred any liabilities, other than its own fees and expenses in this lawsuit. There is no claim against Cooper in this matter under CERCLA or otherwise. And so what we're really looking at is does Aviall have a contractual claim back against Cooper under Section 103.(b).

Mr. Faulk jumps to the middle provision in the indemnification, which is Section 7.02(a)(2), saying, "as a result of a breach by seller of any representation, warranty, covenant or agreement contained –" other than the representations. But, in fact, the following provision, 7.02(a)(3), expressly covers " -- any liability of seller, its affiliates or subsidiaries other than assumed liabilities." Those are the matters that are listed in Section 1.03(b).

Likewise, those provisions -- those liabilities under Section 7.02(c) are limited to a five year statute of limitations under the contract, limitations period. We don't get to 7.02(a)(2).

To the extent there is anything left under 7.02(a)(2), the 1982 release absolutely obviated any such generic

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liabilities, agreements, et cetera. You look at the release, it's all representations, warranties, covenants and agreements of Cooper contained in the agreement are deemed to be fully satisfied forever. Aviall releases Cooper from any and all obligations and claims to indemnify Aviall for any breach of a representation, warranty, covenant or agreement, unless it'' specifically carved out in Section 3.2. There is no carve out for some generic, extraordinary, retained future-arising unknown liability. It just doesn't exist in the contract. There is no provision for things that are unknown at the time of the closing.

The 7.02(e) reference is still irrelevant. The release eliminated any residual agreements that could have existed.

Mr. Faulk raised the issue about the course of conduct of Cooper. We pointed out in the brief: A, that it isn't accurate to try to compare the two. All of the situations referenced by Aviall were off-site CERCLA sites, real CERCLA sites that involved claims against Cooper and Aviall for disposals where there was direct claim of CERCLA liability against the parties. Cooper made the practical judgment to simply buy into the settlements on some sites. But, in fact, the contract, Section 8.06(b) of the

I mean, there are a couple of ways to look at the argument: One is as a result of your doing that Cooper is not liable at all; another way of looking at it is, if in fact you bought a Cadillac when a Volkswagen might have done just as well, they only pay for the part of the Volkswagen. What's your position?

MR. FAULK: Obviously the latter one, Your Honor. In our reply brief, I believe it was, I brought out the fact that it jumps the gun on the question. The question of liability and allocation can be decided without deciding how big the pot of damages should be. If in fact the pot of damages that -- is not to include certain things that the court would deem to be upgrading the property, or unnecessary, that would be cast out and excluded from the ultimate award of damages entirely and only those things which are appropriate would then be decided according to the allocation formula that we have proposed.

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THE COURT: And then perhaps the next question would be by permitting you to do that on your own and by the nature of remediation, understanding that it's not surface work, have you deprived them of a fair opportunity to see whether work was excessive or not, because they're looking at it after the fact.

MR. FAULK: They have not, of course, argued that. That's not been a point that they have raised, that they have been in any way prejudiced as a result of anything that's been done out there. Every single piece of work that's been done out there, and it's a very voluminous set of documents, has been documented here. There are

reports. There are orders and submissions to the TNRCC. And never one has Cooper in any real sense complained that it's been denied the opportunity to find out the identity of persons who do the work, to take their depositions, to look at the documentation for the expense and its reasonableness and necessity. That's just not an argument that's been made.

As a matter of fact, the record is such that they can go and do exactly that. And we'd certainly be happy to, in the course of a damages phase here, to facilitate that by making sure that all the information that we had that we're obviously making a claim on has that particular documentation.

Dr. Zelikson talks about the costs. Mr. Thompson, one

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of our other experts, talks about them. And they have reviewed the entire record. At this point they have not been deposed, but that is a matter they could be deposed upon, on the question of recoverable damages.

I'm at five minutes, maybe I have one minute to sum up. If the court has no further questions, I would just like to mention that I do believe and Aviall believes that this is in fact a contract case, that looking at the terms of the contract there is a meeting of the minds in this case, and that under the terms of the contract there's a recovery here, as well as under the state laws. However, we believe the CERCLA claim is properly framed and properly brought before the court and that the court has subject matter jurisdiction of the CERCLA claim by virtue of the Centurior case and the Sun

Specifically, they said, subject to 7.02, which contains the time limits that aren't applicable to the section we're suing under, the agreements set forth in the agreement survive, notwithstanding, and it's specifically quoted, any examination made for or on behalf of buyer, the knowledge of any of its officers, directors, shareholders, et cetera. And under those circumstances the parties contractually eliminated any argument that continuous employment would somehow of itself give rise to some sense of liability or some sense of knowledge that would sacrifice rights of action under the contract.

I'm going to talk a little bit, Your Honor, if -- did you have questions?

THE COURT: No. You may proceed.

MR. FAULK: I want to talk a little bit, Your Honor, about the question of the petroleum exclusion applicability. We recognize that CERCLA has petroleum exclusion. Our record in the case establishes that there are in fact petroleum costs, that we're not seeking recovery under CERCLA under the petroleum exclusion. But petroleum costs are available, Your Honor, associated with the breach

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of contract action and the various state environmental law causes of action, and we have substantiated those for those purposes. So the full range is available under one or more causes of action that we've asserted in addition to CERCLA.

I also want to talk a bit about the question of substantial compliance that has been discussed here with the

NCP under CERCLA. Mr. Stephenson brings out the point that he believes that the public notice and comment provisions weren't properly satisfied --

THE CLERK: Five minutes.

MR. FAULK: -- in this case. Thank you.

Under the circumstances of this case we're not looking at an action brought by the federal government or the EPA or a state agency of any kind regarding this issue. The 1990 NCP which governs this case, because CERCLA substances weren't discovered on any of the properties until 1991, says that we only have to have substantial compliance. And if you look at the EPA guidelines, specifically those that our expert Mr. Zelikson summarized in his affidavit as he went through this, the purpose of the entire substantial compliance rule is not to penalize parties who go in and clean up sites by requiring excessively technical compliance but rather to make sure that what they do is appropriate to the characteristics of the site and the necessary nature of the response.

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THE COURT: Let me ask you a question that is somewhat related to this concept.

A recurring theme in Cooper's briefing is you went out and did all this upgrading -- you know, they characterize it that way -- of the properties, the four facilities on your own, then at some point you decide to stick us for it so to speak. Is that an issue really of allocation of responsibility as opposed to liability?

does not necessarily alleviate us from the burden of going through and specifically demonstrating and arguing the applicability or the propriety of any number of thousands of bits of information as to what the amount of recoverable damages will be.

There is some discovery that needs to be done to round out the damages. There is some discovery that needs to be done with respect to allocation, if in fact the court determines that the allocation scheme we have proposed requires additional testimony, before a ruling could be done, we would ask the court to give us an opportunity to provide a supplemental expert opinion on that.

THE COURT: But those would be issues under the contract, the purchase agreement, would they not?

MR. FAULK: They would. And under the Solid Waste Disposal Act and Texas Water Code.

So the answer is that there was a substantial amount of work to be done, but if the court determines it has no jurisdiction, the work would necessarily be done somewhere.

THE COURT: Well, I guess another way of phrasing it is what work would you have done that would be lost: and it sounds like it would not be lost, that the arguments

would be made in the context of state claims, whether under the agreement or Texas statutory law.

MR. FAULK: I think, Your Honor, the arguments would definitely be made. We would, of course, only lose that portion of the case which dealt with CERCLA but, of course, that's a critical part of our case.

THE COURT: All right. Why don't you return then to your arguments. I just wanted to make certain I got my questions answered.

MR. FAULK: That's all right. I'm happy to do that.

I wanted to talk a little -- some about the CERCLA claim, but there's one thing I wanted to mention, and I can't ignore, with respect to an argument that Mr. Stephenson made. Mr. Stephenson argued that Mr. Lambert, who was a ***continuous*** employee of both Cooper and then Aviall in an executive position for a year or so after the transaction, that that somehow imbued Aviall with some sort of knowledge that this really was something that was not newly discovered, that everyone knew this had happened. And Mr. Lambert's deposition was taken in this case and it did not establish that he had specific knowledge.

But the most important thing, if the court will look at Section 7.01 of the contract, page 10 (sic) of the little handout that I gave you, and the interesting thing about

that, is that in that section the parties contractually agreed that the knowledge of continuing employees was to have no affect on the survival of causes of action granted in the contract.

how-are you using 107 when we look at 113.

MR. FAULK: Yes, Your Honor. What I'm trying to do is use 107 as an element of the contribution cause of action under 113 in this type of lawsuit. That is as clear as I think I can make it.

THE COURT: That was pretty straightforward. That's fine.

MR. FAULK: Okay. Okay.

THE COURT: And what is your response to the -- to the contention that the absence of notice deprives this court of subject matter jurisdiction?

MR. FAULK: Your Honor, I heard the court's question regarding that, and Mr. Stephenson was quite right in part of his answer. The cases that he relies upon are all cases involving citizen suits under RCRA or the Clean Water Act where the party bringing the cause of action is serving as the private Attorney General on behalf of the government, essentially representing the government, representing the government's interests in securing penalties that are then payable to the government. Where a party is representing the United States Government is standing in its shoes as the private Attorney General, there is a great incentive for the government to be aware of the litigation, for the government to be aware and have the right to make an informed decision as to whether to

participate or not. However, here we're not serving as the private Attorney General. We're not representing the government here.

This is a private cause of action, seeking money damages only, between two PRPs. And under those circumstances, the interests underlying the notice in those statutes are diametrically different. Had the notice -- the failure of the notice in this situation is nowhere close to having the impact that it does on the government. The government still has its rights, even with the belated notice, to take whatever action it deems appropriate to enforce this matter, irrespective of whether -- what time the notice was received. Our actions have no affect on their standing. But in another case, the Clean Water Act or RCRA, they could severely compromise the government's position if the notice was not received.

THE COURT: If the court were to decline to exercise supplemental jurisdiction over state claims, what would you and Cooper have left to do but to take the state briefing that you have and present it to a state court that we generally recognize is more familiar with state issues? What is there left to do in the lawsuit, other than take the discovery you have and the arguments and present them to a state tribunal?

MR. FAULK: Well, there are some issues of

discovery with respect to supplementing expert opinions, with respect to updating the cost information. And I want to tell the court that by shifting it over to the state court, it's -- it